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"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases

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"WHODUNIT" VERSUS "WHAT WAS DONE": WHEN TO ADMIT CHARACTER EVIDENCE IN CRIMINAL CASES

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In virtually every jurisdiction in the United States, the law of evidence prohibits parties from offering proof of an individual's general character traits to suggest that, on a specific occasion, the individual behaved in a manner consistent with those traits. In a criminal trial in particular, the law prohibits a prosecutor's introduction of evidence about the defendant's character as proof of his guilt. In this Article, Professor Colb proposes that the exclusion of defendant character evidence is appropriate in one category of cases but inappropriate in another. In the first category, which Professor Colb calls "whodunit" cases, the parties agree that a crime was committed but disagree over whether it was the defendant who carried out the crime. In such cases, character evidence about the defendant ought to be excluded, because the defendant's salience in the courtroom may make his character traits appear far more damning than they actually are, given the many "bad" people outside the courtroom who could have committed the offense. In "what was done" cases, by contrast, the prosecutor and defense agree that the defendant was involved in the transaction being litigated but disagree over whether his role was criminal. In such cases, character evidence about the defendant is not misleading, because there is no potential third party with the same trait who could have committed the offense: either the defendant did it or no one did. In these cases, the defendant's character traits can help the jury determine what happened. Professor Colb demonstrates that the "whodunit" versus "what was done" dichotomy also provides a way of

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determining when evidence of a victim's character traits ought to be admissible. In particular, Professor Colb explores the interplay between her dichotomy and the rape shield laws, which exclude victim promiscuity evidence in rape cases. She concludes that because of a concept she develops and terms "conditional irrelevance," promiscuity evidence is irrelevant in rape cases and ought to be excluded for that reason.

INTRODUCTION

In 1991 William Kennedy Smith stood trial for the rape of Patty Bowman.[1] Bowman testified that Smith had raped her on the lawn near his house.[2] Smith acknowledged that he and Bowman had sexual intercourse, but he maintained that it was consensual.[3] Though three women separately came forward and told of being raped or sexually assaulted by Smith, the judge refused to allow them to testify

1. John R. Hicks, *Prosecution Case Hinges on Alleged Victim's Testimony*, UNITED PRESS INT. (N.Y.), Dec. 8, 1991, *available at* LEXIS, News Library, UPI File.
2. *Id.*
3. *Id.*

at trial.[4] The reason for this refusal was the propensity rule or "character rule,"[5] and Smith was subsequently acquitted.[6]

The evidentiary ruling in the Smith trial is noteworthy for two reasons. First, it dramatizes the application of a rule that, in one form or another, binds most courts in the United States.[7] The rule prohibits the introduction of character evidence to prove that an individual acted in conformity with his character on the occasion in question.[8] Second, the Smith evidence ruling appears to have played a role in motivating a legal reform—namely, the passage of Federal Rules of Evidence 413–415 and some analogous state law rules.[9] These rules carve out exceptions to the character rule in cases of rape and child molestation. Apart from these crime-specific exceptions,

4. David Margolick, *Why Jury in Smith Case Never Heard From 3 Other Women*, N.Y. TIMES, Dec. 13, 1991, at B14; Anna Quindlen, *Truth and Consequences in Palm Beach*, CHI. TRIB., Dec. 10, 1991, at A27.

5. *See* FLA. STAT. ANN. § 90.404 (West 2000).

6. *Verdicts in West Palm Beach*, N.Y. TIMES, Dec. 13, 1991, at A38.

7. *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1, T-34 to T-39 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) (noting that "[f]orty-one states . . . have adopted the Federal Rules of Evidence in various forms" and listing the corresponding state versions of Rule 404, the character rule).

8. *E.g.*, FED. R. EVID. 404. Rule 404(a) provides: Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." FED. R. EVID. 404(a). Most state jurisdictions have either adopted the federal rule or drafted similar versions of their own. *See* 6 WEINSTEIN & BERGER, *supra* note 7, at T-34–T-39.

9. Jeffrey Waller, Comment, *Federal Rules of Evidence 413–415: "Laws Are Like Medicine; They Generally Cure An Evil By A Lesser . . . Evil,"* 30 TEX. TECH L. REV. 1503, 1505–06 (1999) (noting that outrage against the Smith ruling contributed to the drafting of Rules 413–415); *see also* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 15 (1994) (discussing the then proposed Rules 413–415). Karp states that "[p]ublic attention ha[d] been focused on this issue by the William Kennedy Smith case in Florida," although he notes that "the proposal for reform . . . pre-date[d] that particular case." *Id.* Karp was, at the time he wrote the article, Senior Counsel, Office of Policy Development, United States Department of Justice. *Id.*

A few states have adopted legislation similar to Federal Rules of Evidence 413–415. *See, e.g.*, CAL. EVID. CODE § 1108 (West Supp. 2001) (permitting the admission of a defendant's prior sexual offenses); IND. CODE ANN. § 35-37-4-15 (Michie 1998) (admitting evidence of similar crimes in prosecutions for child molestation, incest, and conspiracy to commit child molestation or incest); MO. REV. STAT. § 566.025 (1999), *amended by* S.B. 757 (Mo. 2000) (permitting evidence of prior similar crimes in prosecutions for crimes involving victims under the age of fourteen). Some of these state rules have run into problems. The Indiana rule was declared a nullity by a state court decision, although it is apparently still on the books. *See* Day v. State, 643 N.E.2d 1, 2–3 (Ind. Ct. App. 1994). The prior version of the Missouri rule was declared unconstitutional by a state court. State v. Burns, 978 S.W.2d 759, 760–62 (Mo. 1998) (en banc). It remains to be seen whether the amended version of the rule will pass muster under the state constitution.

however, the character rule remains in force and accordingly limits the use of propensity evidence in all federal and most state courts.

The federal sex-crime exceptions to the propensity rule[10] have encountered considerable scholarly opposition from the time that they were first proposed.[11] Supporters of the character rule argue that no principled distinction between accused sexual offenders and other classes of defendants justifies such disparate treatment.[12] Even commentators who generally oppose the character rule have criticized Congress for passing crime-specific exceptions to it.[13] According to

10. Rule 413 states in part that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a). Rule 414 states in part that "[i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 414(a). Rule 415 provides a similar exception for civil cases. FED. R. EVID. 415.

11. *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 565 (1997) (describing Rule 413 as unjustifiable on the basis of feminist theory); Joseph A. Aluise, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 195 (1998) (arguing that Rules 413–415 depart from the normal ban on "propensity evidence" on the basis of an unsubstantiated belief that rapists and child molesters represent a special class of defendants more likely than other criminals to re-offend). In addition, the Federal Judicial Conference opposed the amendments. Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, *reprinted in* 159 F.R.D. 51, 52–54 (1995) (expressing misgivings about the proposed rules); *see also* Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 2 (1996) ("Recent scholarship suggests that many judges, law professors, and lawyers strongly oppose [Rules 413–415]."); Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 950 (1999) (noting that Rules 413–415 "have been the subject of much criticism and debate" and that they, according to many commentators, "undermine the integrity and rationality of the Federal Rules of Evidence").

12. *See* Baker, *supra* note 11, at 565; Leonore M.J. Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387, 401 (1997) (concluding, based on empirical evidence, that past sex offenders are no more likely to commit future sex offenses than past robbers are to commit future robberies, and that, therefore, it is unfair to single out sex offenders as recidivists); Aluise, *supra* note 11, at 195.

13. *See* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1587–90, 1626 (1998) (claiming that the character rule is never justified because it is based purely on a mistrust of juries, and asserting that specific crimes should not be distinguished by how easy or difficult they are to prosecute); *see also* James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 756 (1995) (noting that "to retain the general presumption of inadmissibility, but then make mandatorily admissible two of the largest categories of such

such commentators, a more appropriate reform would abolish the character rule altogether.[14]

In this Article, I propose an innovation that would impose order and logic on what is currently a complicated and largely arbitrary approach to propensity evidence.[15] I submit that different categories of criminal cases do indeed call for distinct rules regarding propensity evidence. I therefore reject the all-or-nothing approach to propensity evidence that would deem Rules 413–415 to be misguided simply for treating some cases differently from others. I argue, however, that Rules 413–415 do not draw the right distinctions. In place of the sexual versus nonsexual crime divide embraced by these rules, I propose a rule that would exclude character evidence against defendants in what I call "whodunit" cases and admit character evidence against defendants in what I call "what was done" cases.

In the typical "whodunit" scenario, both the prosecution and the defense acknowledge that a crime has been committed. They disagree only about the identity of the criminal. In these cases, I propose that the character rule protecting the defendant should apply regardless of the crime. In the "what was done" scenario, by contrast, the prosecution and defense agree that the defendant was involved in the transaction being litigated. The controversial question is whether or not the defendant's involvement was *criminal.* The category of consent-defense rape cases represents one, though not the only, example of the "what was done" scenario. In "what was done" cases, I propose that character evidence against the defendant ought to be admissible.

In addition to helping us determine whether to admit propensity evidence against a criminal defendant, I show that the "whodunit" versus "what was done" dichotomy also provides a useful way to distinguish those cases in which the defense should be allowed to

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evidence—is to deprive the rules of any coherent rationale").

14. *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 301–02 (1995) (supporting limited experimentation with the repeal of the character evidence prohibition but arguing that Rules 413–415 are inappropriate starting points); Melilli, *supra* note 13, at 1621–26; Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413–415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS U. L.J. 277, 309 (1996) ("[C]ontrary to what some critics contend, it appears that [Rules 413–415] are not misguided because they permit prior misconduct evidence in sex offense cases, but because they make an insupportable distinction between sex offenses and other violent crimes.").

15. *See generally* Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123, 123–95 (1987) (discussing the structure of the character rule).

offer *victim* propensity evidence from those in which it should not. In doing so, I evaluate the rape shield law, which excludes victim sexual propensity evidence and accordingly might appear to conflict with my basic proposal for victim evidence in "what was done" cases. I reject some existing scholarly defenses of the rape shield law. I nonetheless conclude that, because of a logical construct that I call "conditional irrelevance," the probative value of sexual propensity evidence for determining consent on a particular occasion essentially vanishes once a complaint of rape has been lodged. I demonstrate through a series of examples that, once a person has made a rape complaint, her propensity for dishonesty or treachery—rather than her disposition for consenting to sex—becomes decisive.

After developing and illustrating the merit of the "whodunit" versus "what was done" categorization of character evidence, I offer a provisional account of why juries might be inclined to overconvict in "whodunit" cases and underconvict in "what was done" cases and explore how my proposal might help to ameliorate these systemic distortions.

I. THE CHARACTER RULE

Before more thoroughly examining my proposal for eliminating the propensity rule[16] in the "what was done" category of cases, it is important to understand in basic terms what the character rule currently requires. The rule limits the use of "character evidence"—evidence that consists of facts about some enduring trait of an individual. Such evidence is excluded when offered in support of the claim that the individual's actions on a specific occasion conformed with her character. Prohibited character evidence might include the testimony of a character witness about the stinginess, cruelty, or violence of a criminal defendant, as well as evidence of specific acts proffered in support of the same conclusion.[17]

16. I shall use the phrases "the character rule," "the propensity rule," and "the Rule" interchangeably, to denote the rule prohibiting the introduction of character evidence in support of the inference that the person possessed of such a character acted in a manner consistent with that character at a particular time. *See* FED. R. EVID. 404. I do not evaluate here the use of prior misconduct evidence for "other purposes," such as demonstrating "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" pursuant to Rule 404(b). *Id.* at 404(b).

17. Though there are preferred and disfavored methods of proving character when character evidence is admissible, *see* FED. R. EVID. 405(a), this Article addresses only the preliminary admissibility question. There is a separate debate over the forms that any admissible character evidence should take. *Compare* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*,

Consider the following illustration of the character rule. The prosecution in a murder case wishes to offer evidence that the defendant has committed violent crimes in the past. On the basis of his criminal history, the prosecution plans to argue that the defendant is more likely to have committed the murder of which he now stands accused.[18] The propensity rule bars this evidentiary move (subject to certain exceptions).[19] The rule rests on the foundational principle that people should be held accountable for what they do rather than for who they are.[20]

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24 J. LEGIS. 125, 127 (1998) (proposing the admission in rape cases of extrinsic evidence of the complainant's specific prior false rape accusations, after the defendant has made a preliminary showing of their falsity), *with* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 YALE J.L. & FEMINISM 243, 243–45 (1995) (arguing that extrinsic evidence of a rape complainant's prior false accusations of rape should not necessarily be admissible to prove her insincerity).

18. In addition to a criminal defendant, any person whose actions are relevant to a particular litigation could theoretically be the subject of character evidence. This would include parties to the litigation or someone who has harmed (or been harmed by) one of the parties, such as the victim of a homicide.

19. For the general rule, see FED. R. EVID. 404(a). The exceptions and exclusions provided in Rule 404 are as follows:

> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
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> (2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
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> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609. . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident. . . .

FED. R. EVID. 404.

Rule 405 provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
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> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

FED. R. EVID. 405.

20. *See* David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 IND. L.J. 1161, 1162 (1998) ("One

Defenders of the character rule do not argue that a defendant's violent character is completely irrelevant to a determination of whether he has committed a homicide.[21] Indeed, if evidence of character were truly irrelevant, then we would need no special rule barring its admission.[22] Supporters of the character rule argue that, notwithstanding its relevance, we should exclude character evidence because jurors tend to give it undue weight. Such jurors might convict on a flimsy factual record because of a defendant's prior criminal history.[23] In our homicide trial example, a jury might assume that the defendant is guilty of the murder—given his criminal history—and not pay adequate attention to the strength or weakness of the evidence specific to *this* case. Another concern is that the jurors might decide to punish the defendant for being bad, even if they believe that he is innocent of the charged criminal conduct.[24]

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of the oldest principles of Anglo-American law is that a person 'should not be judged strenuously by reference to the awesome spectre of his past life.' " (quoting M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 325 (1956))). *Contra* Sherry F. Colb, *The Character of Freedom*, 52 STAN. L. REV. 235, 248–49 (1999) (suggesting that notwithstanding evidentiary rules to the contrary, our society's vision of criminal culpability is very much tied to conclusions about whether or not an individual charged with an offense was driven by a malevolent character).

21. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 310 (1995) (" 'The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' " (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948))); Waller, *supra* note 9, at 1532 ("[T]he [Supreme] Court has stated that the danger of admitting character evidence is not irrelevance; rather, the danger is that the jury may give too much weight to the evidence and prejudge the defendant."); *see also* Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 978–80 (1998) (noting that evidence of prior acts often has been thought to be relevant to prove conduct, but contending that it is too prejudicial and should thus be excluded under the character rule).

22. *See* FED. R. EVID. 402 (excluding all irrelevant evidence).

23. *See supra* note 21 and accompanying text; *see also* Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1138 (1993) ("In sum, there is a risk that the lay jurors will overestimate the probative value of character as a predictor of conduct."); Roger C. Park & David P. Bryden, *Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion*, 141 MIL. L. REV. 171, 196–97 (1993) ("The jury may decide to convict even if it believes the defendant innocent, or it may treat the evidence about the charged incident with abandon, because it believes the defendant to be a bad person who deserves to be punished whether or not technically guilty of the charged crime."); Waller, *supra* note 9, at 1510 ("The major concern of all parties in the legal system is the possibility that the propensity evidence may persuade the jury to convict the defendant based upon the defendant's past actions and not the current crime.").

24. *See* Natali & Stigall, *supra* note 11, at 11–12 (noting that courts often exclude propensity evidence because of the danger that jurors will convict the defendant because

Finally, after learning about a defendant's bad character, the jurors might be less concerned about the possibility of convicting an innocent person and thus less vigilant about properly applying the "beyond a reasonable doubt" standard to the evidence.[25] To prevent such actions, we shield the jury from information that we fear might cloud its judgment.[26]

Critics of the propensity rule traditionally have argued for its abolition,[27] while the rule's supporters have urged its fortification by narrowing its exceptions or by curtailing allowances for "specific acts" evidence offered to prove something other than character.[28] After the

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he or she is a "bad person").

25. *See* John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073–78 (1968).

26. Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 42 (1994) ("[T]he underlying assumption of the American character evidence prohibition is that lay triers of fact will misuse character testimony ...."); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES AND PROBLEMS 1 (4th ed. 2000) (citing mistrust of juries as the "single overriding reason for the law of evidence").

27. *See, e.g.*, Melilli, *supra* note 13, at 1620–21 (concluding that "character evidence cannot and should not be banished from the field of proof"); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (same).

28. *See* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 544, 551 (1994) (arguing against the often-pretextual use of Rule 404 "motive" or "intent" as a loophole for propensity evidence); *see also* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines that Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 44–45 (1990) (discussing two doctrines that permit prosecutors to offer uncharged crime evidence against the defendant to prove mens rea). Professor Imwinkelried argues that such allowances "may substantially undermine the character evidence prohibition" and argues for their elimination in order to preserve the character rule. *Id.*; *see also* Leonard, *supra* note 20, at 1181–201 (tracing the historical, philosophical, and religious justifications for the ban on character evidence and concluding that fear is the reason that the character rule is under attack). He argues:

> The more people come to see society as composed of predators and victims, the more likely it is that legislatures will adopt rules designed to protect the latter from the evils of the former. The so-far partial abrogation of the character ban is emblematic of this trend. Respect for the traditions of American law and for the principle that its institutions should reflect our highest aspirations demand that that trend be reversed.

Leonard, *supra* note 20, at 1215; *see also* Miguel A. Méndez & Edward J. Imwinkelried, People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 474 (1995) (criticizing the use of prior acts evidence to prove certain things other than character, and noting that "[p]rosecutors favor uncharged misconduct evidence precisely because they know that it is one of 'the most prejudicial [types of] evidence imaginable' " (quoting People v. Smallwood, 722 P.2d 197, 205 (1986))); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 135–36 (1989) (arguing for rules limiting the admission of evidence of

1994 passage of the rules creating a rapist and child-molester exception to the federal character rule,[29] scholars began to question whether it is indeed appropriate to exempt some categories of criminal offenses from the general character rules.[30] Professors Roger Park and David Bryden, for example, have defended the notion that at least in consent-defense rape prosecutions, courts ought to admit evidence of a defendant's propensity for sexual assault, as Rule 413 would permit them to do, because such evidence is highly probative.[31]

This Article contends that the distinction between "whodunit" and "what was done" cases provides a more principled basis for deciding when to apply the propensity rule than does the distinction between sexual and non-sexual offenses. In support of this hypothesis, the next part elaborates how the structure of the "what was done" scenario renders propensity evidence about the defendant both more probative of guilt and less likely to cause unfair prejudice than it would be under the "whodunit" scenario.

II. THE CATEGORIES: "WHODUNIT" VERSUS "WHAT WAS DONE"

In a criminal trial, the prosecutor must carry the burden of proving both identity—that the defendant is the person who carried out the crime—and actus reus—that a criminal act was carried out.[32] Thus, in theory, every trial implicates both "whodunit" *and* "what was done" concerns. Ordinarily, however, a defendant actively

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prior bad acts to prove something other than character due to the limited ability of jurors to distinguish between the improper and proper purposes of Rule 404(b)).

29. *See* FED. R. EVID. 413–415.

30. *See, e.g.*, Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1741–42 (1999) (asserting that consideration of highly recidivist crimes may provide a justification for admitting propensity evidence); Danna, *supra* note 14, at 309 (concluding that Federal Rules of Evidence 413–415 are based on a "sound premise" but that admissibility of prior crimes evidence should be expanded to cover the whole category of "violent crimes").

31. *See* Bryden & Park, *supra* note 28, at 555; *see also* Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 381 (1996) (calling Rules 413–415 "groundbreaking in their direct approval of admitting uncharged acts for the explicit purpose of propensity and disposition" and advocating similar exceptions for domestic violence prosecutions); Scott, *supra* note 30, at 1742 ("Propensity evidence should be allowed in sex crime cases even though it otherwise would be inadmissible to prove guilt in trials for other highly recidivist crimes."); Waller, *supra* note 9, at 1550 ("The new rules [Rules 413–415] represent a necessary change in the legal maneuvering that was required under Rule 404(b) when trying a case involving sexual misconduct.").

32. Actus reus is defined as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY 37 (7th ed. 1999).

controverts only one of these two elements and essentially stipulates to the other.[33] In the "whodunit" case, a crime has obviously been committed. An armed man has entered a bank in a ski mask, for example, and ordered all customers to freeze while directing bank employees to hand over cash. The attorneys prosecuting such a case do not need to spend much time establishing that the masked person in the bank violated the criminal law. Prosecutors can instead focus their efforts on showing that it was the defendant, rather than someone else, who carried out this unquestionably criminal act.

In the "what was done" case, in contrast, there is no dispute about identity. The defendant was involved in the transaction at issue in the case. What divides the prosecutor and defense counsel in such cases is the question of what exactly the defendant did and under what circumstances. Perhaps the defendant in a homicide case claims to have killed his victim justifiably in self-defense. The answer to the "what was done" question will generally turn on some combination of the defendant's state of mind during the offense—mens rea[34]—and what the victim of the alleged crime did immediately beforehand.

A defendant on trial for aggravated assault[35] might claim that the victim attacked first and thereby placed him in reasonable fear for his own safety. In such a case, the prosecution need not convince the jury that it was the defendant rather than some third party who injured the victim. The prosecution can instead concentrate on

33. Whether a defendant may stipulate to an element of a crime raises a controversial issue. *See* Old Chief v. United States, 519 U.S. 172, 186 (1997) (holding that, although the prosecution is generally entitled to "prove its case by evidence of its own choice" and is not automatically bound by the defendant's proffered stipulations, the stipulation offered should have been accepted under Rule 403). Because the prosecution bears the burden of persuasion on every element as a matter of due process, *see In re* Winship, 397 U.S. 358, 364 (1970), the defendant—in the absence of a guilty plea—arguably may not withdraw any issue from the jury's consideration. In practical terms, however, there are situations in which, absent evidence to the contrary, it is logical to conclude from proof establishing one element that another element is established as well. One example is a homicide case in which the prosecution proves that the defendant held a gun to the victim's head and fired four times and that the victim died of four gunshot wounds. Although the defendant might have believed that the gun was not loaded and meant only to scare the victim, absent evidence to this effect, it would be eminently reasonable for the jury to conclude that the defendant intended to kill the victim.

34. Mens rea is defined as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness." BLACK'S LAW DICTIONARY 999 (7th ed. 1999).

35. The Model Penal Code defines aggravated assault as occurring when a person: "(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." MODEL PENAL CODE § 211.1(2) (Official Draft 1962).

demonstrating to the jury that the defendant's actions were not taken in response to any threatening conduct by the victim.

In short, most cases present either the "whodunit" or the "what was done" scenario, but not both. What role should character evidence play in each? In the "what was done" scenario, the defendant's violent tendencies increase the plausibility of the prosecutor's claim that the defendant, without justification, initiated violence against the victim. Under the "whodunit" scenario, of course, the defendant's propensity for engaging in the charged conduct also increases the apparent odds of his guilt. Past violence, after all, is an important predictor of future violence.[36] Propensity evidence in the "whodunit" context, however, changes the apparent odds of guilt primarily by placing the defendant in a narrower universe of potential culprits, those who are more likely than the rest of the population to act in the manner charged. What propensity evidence will *not* do is tell us which of the many people who share this propensity committed this offense. In the "what was done" scenario, in contrast, there is no need to narrow down the universe of potential culprits. If there was a crime, then the criminal will be found in the courtroom.

Consider the case of the defendant who is charged with robbing a Wells Fargo bank in downtown Los Angeles. This defendant, as it turns out, has robbed banks on several occasions in the past. In trying to determine who committed this specific robbery, it is useful to know that the defendant is a robber. The police, for example, can look for a suspect among the population of known robbers. Roger Park calls this technique "rounding up the usual suspects."[37] This strategy

36. *See* R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50, 50 (1998) ("Those offenders most likely to reoffend have been identified by risk factors such as a history of criminal behavior . . . ."); *see also* Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 L. & HUM. BEHAV. 143, 154 (1988) ("Past violent behavior as measured by arrests has shown a strong relationship to future violence."). Klassen and O'Connor's study indicates that 59.3% of subjects predicted to be violent on the basis of past violent behavior were actually violent in the future. *Id.* at 152; *see also* JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR 104–05 (1981) ("If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act."). *Contra* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 670 (1998) ("People are not predictable characters; many question whether we can reliably determine how someone behaved on one particular occasion by reviewing his or her past deeds.").

37. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 273 (1995) (borrowing from CASABLANCA (Warner Studios 1943)).

reduces the amount of investigative work necessary to track down a viable suspect. Once a defendant is ready to stand trial for the robbery, however, his membership in the category of people who have robbed before is of more limited value. It may tell us that because the defendant is in the class of "robbers," it is more probable that he committed the crime than that a member of the population at large, including robbers and non-robbers, did. Those persons inclined to commit robbery, however, are plentiful. Knowing that the defendant is one of them does not convey information about which of the many existing robbers carried out *this* robbery.[38]

Though the "whodunit" defendant's criminal history has very little probative value at trial, it nonetheless has the potential to prejudice the defendant's case greatly. Out of the universe of possible culprits—people who are inclined to commit robberies—the jury sees only one person, the defendant. When the jury learns of this one visible person's propensity for committing robberies, the defendant's salience in the courtroom makes his propensity appear to distinguish him from the crowd. This appearance is deceptive, but can nonetheless influence the jury's evaluation of the evidence. The reality is that the police most probably focused their investigative attention on the defendant at least in part because of his prior criminal record. It is thus no coincidence that someone with a criminal record is sitting in the defendant's seat. Propensity evidence in "whodunit" cases is therefore even less telling than it might seem at first glance.

The "what was done" scenario is quite different. The entire class of potential culprits is in the courtroom. The jury must determine what the victim and the defendant did in their interaction, not whether the true culprit was actually some absent third-party. Consider the case of a defendant involved in a barroom fight with a man sitting on the neighboring barstool. Assume that the defendant concedes that he injured the victim but claims that he was acting in self-defense. Under these circumstances, learning that the defendant is predisposed to behave violently does not misleadingly divert attention away from an invisible class of potential culprits who share the defendant's predisposition. In this setting, knowing of the

38. Additionally complicating this story, it is far from certain that a convicted robber carried out this offense. Every robber has to have a first time, and this robbery could be someone's first. Furthermore, many repeat robbers have been successful at evading capture and therefore would not necessarily even register as robbers in the prosecutor's data bank.

defendant's predisposition makes the prosecutor's version of what occurred when the defendant injured the victim more plausible.

Conversely, learning that the *victim* is predisposed to behave violently makes more plausible the *defendant's* version of events. Yet under the current law, the jury would hear about the defendant's violent predisposition only if the defense first offered evidence of either the victim's violent predisposition or the defendant's peacefulness.[39] This creates an evidentiary disparity between the admissibility of equivalent evidence. The law readily admits "bad victim" character evidence while significantly impeding the admission of "bad defendant" character evidence. This disparity might account for the difficulty of obtaining convictions in such assault cases.[40] Admitting anti-defendant predisposition evidence in "what was done" cases could help correct this problem, a problem that is in no way dictated by due process or the presumption of innocence. A defendant does not have the right to exclude relevant evidence simply because it is highly relevant and therefore damaging to the defendant's prospects for an acquittal.

In sum, defendant character evidence should be inadmissible in "whodunit" cases, while both defendant and victim character evidence should generally be admissible in "what was done" cases. Is this reform practical? It would appear to be. A judge could decide

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39. This is because the character rule provides an exception for pertinent victim character traits when introduced by the defendant, but does not provide an exception for pertinent defendant character traits when introduced by the prosecutor. *See* FED. R. EVID. 404(a)(1).

Once the defense has offered bad character evidence about the victim, the prosecution may offer "evidence of the same trait of character of the accused." *Id.* Under the amendment allowing for such evidence as of December 1, 2000, the rule more closely approximates my approach, by admitting bad character evidence about a defendant when the defense has offered bad character evidence about the victim (pertinent only in "what was done" cases, as explained *infra* note 52 and accompanying text). The rule still fails, however, to allow for the introduction of anti-defendant character evidence when such evidence would be most informative—when there is no "bad victim" character evidence for the defense to offer (and hence no opportunity for the prosecution to introduce parallel "bad defendant" character evidence).

40. *See* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1324 (1997). The authors obtained firsthand accounts of proof problems similar to those encountered in the acquaintance rape context by interviewing "several veteran criminal lawyers" and asking them to "[n]ame some crimes where it is difficult to obtain a conviction because the only strong evidence is the victim's testimony, thus reducing the trial to a swearing contest." The authors also requested that the lawyers "recall the usual outcome of such cases in their own experiences. All the lawyers named nonsexual assault as a crime where swearing contests often occur. One defense attorney observed that such cases, 'generally involve a race to the courthouse where whoever wins is the "victim." ' " *Id.*

whether to classify a case as "whodunit" or "what was done," based on evidentiary arguments prior to trial. Her decision would then pave the way for further evidentiary rulings on the admissibility of character evidence.

An opponent might raise the concern that under this scheme, the defendant who has heretofore conceded involvement in the transaction at issue, contesting only that it was criminal, might now simply challenge *both* the proposition that there was a crime *and* the proposition that he was involved, in order to thwart the admissibility of character evidence in "what was done" cases. The response to this concern is that the defense has always had an incentive to challenge every possible element of the prosecution's case, because proving both that there was a crime *and* that the defendant committed that crime theoretically requires more work than proving only one or the other. Yet, we do not hear of many cases in which defense attorneys argue to the jury that "not only has the prosecution not proven that my client was at all involved in the transaction at issue, but it has also failed to prove that whoever was involved committed any crime against the victim." The reason for this is simple. A defense attorney who denies the obvious loses credibility with the jury.

Consider why the dual ("whodunit" *and* "what was done") defense would often discredit its proponent. "What was done" cases generally require that the defendant explain what actually occurred and thereby show that, contrary to appearances and perhaps also the testimony of a victim, there was no criminal conduct on his part. Providing such an explanation is generally inconsistent with claiming that the defendant was not involved at all in the transaction at issue in the case. If he were completely uninvolved, he would not have had occasion to learn the details of "what was done."

In a consent-defense rape case, for example, the defense could theoretically argue both that someone else (not the defendant) had sex with the victim *and* that the victim consented to sex with this other person. The jury would be unlikely to believe, however, both that the wrong person is being prosecuted *and* that the right person had a justification for his behavior.[41] Similarly, in a self-defense assault or homicide case, in the absence of eyewitness testimony to this effect, a jury might find implausible the claim that not only did

41. In one rape prosecution that involved elements of sado-masochism (S&M), for example, a jury convicted a defendant who attempted to argue both that the victim consented to what happened to her *and* that at least some of her injuries resulted from another S&M relationship. The conviction was reversed on appeal on evidentiary grounds. *See* People v. Jovanovic, 263 A.D.2d 182, 192–97 (N.Y. App. Div. 1999).

the victim provoke the attack, but it was also *not* the defendant but someone else whom the victim provoked and who then (justifiably) attacked.[42]

The logical division of cases into "whodunit" and "what was done," moreover, is not limited to crimes of violence. A person prosecuted for criminal possession of heroin, for example, might claim that he had no connection with the heroin seized by the police—that they have the wrong man. He could, alternatively, claim that the substance found on his person was baking soda rather than heroin. It would be difficult, however, to claim both that the police had the wrong man *and* that he, the wrong man, somehow knows that the substance the police seized from the right man was actually baking soda. Similarly, in a white-collar criminal case such as insider trading, it is unlikely that a defendant would suggest that prosecutors have the wrong person while simultaneously maintaining that the right person traded without relying on any inside information.

Admittedly, there are cases in which the defendant has an incentive to deny both identity and criminality. A murder case in which no body is found might be such an instance. There the defendant has an incentive to point out the glaring hole in the prosecution's case even if he simultaneously maintains that he did not do any harm to the victim. His primary defense is "whodunit" but, without losing any credibility, he can point out the obvious—that there might not have been a murder at all. Such cases must be viewed, for purposes of my dichotomy, as "whodunit" cases that would therefore preclude the admission of character evidence against the defendant.

Normally, however, when a case is strong enough to go to trial, it will take affirmative evidence from the defendant to make a plausible claim that no crime occurred. Such an affirmative case will, in turn, require that, to maintain credibility, the defendant must forego the argument that the real criminal may be at large. For this reason of credibility with the jury, notwithstanding the theoretical incentive to challenge both identity and criminality, the "what was done" defendant has in the past argued, and under my framework would likely continue to argue, that what happened was not criminal, while conceding that what happened did in fact involve him. On the basis of such concessions, the judge can rule on the admissibility of propensity evidence.

42. For one thing, it is unclear how the defendant would know that the victim either consented to or provoked what happened if the defendant himself was not involved.

III. THE EXCEPTIONS: EXPLANATION AND PRESCRIPTION

Federal law[43] contains three main exceptions to the character rule, several exceptions to the exceptions, and then some additional exceptions that were added more recently. For each exception, the "whodunit" versus "what was done" dichotomy provides a persuasive account of existing departures from the usual ban on character evidence. In some cases, the dichotomy counsels for a narrower or broader exception, however. The dichotomy thus serves as an instrument of both explanation (of current law) and prescription (for legal reform).

A. The Defendant's Character

The first exception to the character rule is for "[c]haracter of accused"[44] and allows for the admission of "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."[45] Thus, in a criminal case, the defendant may introduce evidence of his own good character to show that he would not, and therefore did not, commit the crime in question. Once he does so, the prosecution may rebut with evidence of the defendant's bad character.

Recall that in the "whodunit" context, because of the misleading salience of the defendant at trial, I proposed retaining the exclusion of bad character evidence about the defendant. In the case of good character evidence about the defendant, however, we need not worry about the defendant's salience in the courtroom distorting the apparent relevance of such evidence. If the defendant is truly the sort of person who *would not* commit the crime charged, then it follows that he also *did not* commit the crime in question. The converse, however, does not follow. Proof that the defendant *would* commit such a crime does *not* make it especially likely that he *did* commit this crime when there are many people who *would* commit such an offense, only one of whom presumably committed this one. Thus, just as negative character evidence would continue to be inadmissible against the defendant in the "whodunit" scenario, positive character evidence would continue to be admissible under my proposal, as it is under current law.

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43. I focus on federal law for simplicity and because it often forms a model for state rules. As noted *supra* note 8, many states have broadly similar bodies of evidence law.

44. FED. R. EVID. 404(a)(1).

45. *Id.*

What about defendant character evidence in the "what was done" scenario? Under existing law, no exception to the character rule allows the prosecution to offer such evidence, unless the defense first offers parallel evidence about the victim.[46] Recall the defendant in the barroom fight who stands accused of having assaulted his victim. Evidence that this defendant is a violent person is highly probative and not misleading because both potential assailants, he and his victim, are appropriately salient characters in the drama unfolding in the courtroom. If either of them is shown to be violent, the probabilities are shifted toward that one being the initial assailant. For this reason, I have proposed that negative character evidence about a defendant in the "what was done" scenario should be admissible.

B. The Victim's Character

The second exception to the character rules concerns the "[c]haracter of alleged victim" and provides for the admission of:

> [e]vidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.[47]

On its face, the second exception appears to admit evidence of a victim's *bad* character across the board, but only to admit evidence of a victim's *good* character in self-defense homicide cases.

Consider whether this distinction—between good victim and bad victim character evidence—makes logical sense in the "what was done" scenario. The significance of victim character evidence, in terms of both probative value and prejudicial risk, parallels that of defendant character evidence. In the "what was done" scenario, both the defendant's and the victim's salience in the courtroom are appropriate to their respective roles in the criminal drama. In the case of self-defense assault, for example, one of two events occurred: either the victim behaved in a violent manner giving rise to a justification for the defendant's subsequent actions, or the defendant behaved in an unjustifiably violent manner and is therefore guilty of assault. Learning that the *victim* has a violent character increases the

46. *Id.* at 404(a).
47. *Id.* at 404(a)(2).

odds of the former scenario. Learning that the *defendant* is violent increases the plausibility of the latter scenario. Learning that the victim is peaceful would similarly increase the odds of the defendant's guilt, just as learning of the *defendant's* peacefulness would tend to rule it out. In either case, no absent (and therefore underappreciated) third party dilutes the value of character evidence about the defendant or the victim. Thus, both defendant and victim character evidence—for good or ill—ought to be admissible (and equally so) in the "what was done" scenario.[48]

Now return to the actual rules. Under the rules, positive victim propensity evidence is not admissible unless it is offered in a homicide prosecution—one specific kind of "what was done" case—to rebut the defendant's claim that the victim was the first aggressor.[49] This rule appears to reflect a general bias in criminal cases towards pro-defendant evidence and against anti-defendant evidence. This bias is sensible to a degree, because inappropriately prejudicial evidence has a greater potential to cause injustice if directed against a criminal defendant than if offered in his defense. Nonetheless, if evidence is strong and appropriately persuasive, it does not enhance justice to bar either the prosecution or the defense from offering it for the jury's consideration.

In logical terms, in the case of a violent "what was done" crime, *peaceful victim* evidence is at least as relevant as—if not more relevant than—*violent victim* evidence. Though a violent victim—one who *would* assault another person—could still have been attacked without provocation on the particular occasion, a peaceful victim—one who *would never* attack another person without provocation—is, by definition, incapable of the attack that the defendant claims occurred. The admissibility of victim character evidence in "what was done" cases should therefore not be limited to homicides. Apart from the logical insupportability of excluding positive victim character evidence in "what was done" cases as a general matter, it is also difficult to understand the rationale behind dividing victim character evidence in *homicides* from victim character evidence in other criminal trials.[50]

48. In Part V's discussion of rape victim character evidence, we will see that the proper analogy to the violent victim in a self-defense assault case is the dishonest—rather than the promiscuous—victim in a rape case. *See infra* text accompanying notes 100–02.

49. FED. R. EVID. 404(a)(2); *see supra* note 51 and accompanying text.

50. One possible explanation for the distinction might lie in the notion that it would be cruel to eliminate the victim's presence entirely from a trial adjudicating her death, so the bias against anti-defendant evidence is perhaps suspended in this limited case. The

Let us now turn to victim character in the "whodunit" scenario. Here, evidence of a victim's character is irrelevant to determining whether or not the defendant is guilty.[51] Because Rule 404 admits victim character evidence only if it is relevant, such "bad victim" evidence is inadmissible.[52] Consider why this is true. Recall that in the "whodunit" scenario it is clear that *someone* has committed a crime, but the government must prove that it was the defendant. Consider now a case in which the victim is an elderly woman who is gunned down in a drive-by shooting. Because the defense does not argue that this drive-by shooting was somehow justifiable, the victim's behavior prior to her death does not bear at all on the question of the defendant's guilt.[53] Her character—and any light it might shed on her behavior prior to the shooting—is therefore also immaterial.

The irrelevance of victim character in the "whodunit" scenario extends to both positive and negative victim character evidence. The victim's character does not bear on the guilt of the defendant accused of killing her because, according to both the prosecution and the defense, whoever killed her acted unjustifiably, regardless of how good or bad a person she was. The jury is also likely to become outraged about a crime committed against a good person, and this outrage might unfairly settle upon the potentially innocent defendant. The defendant's misleading courtroom salience in the "whodunit" scenario is very dangerous here, because it places him in the perfect position to be scapegoated. For related reasons, courts have sometimes excluded graphic pictures of a homicide victim to avoid unnecessarily inflaming in the jury the desire to convict someone, anyone, where the defendant—guilty or not—is the only available candidate.[54] In each of these cases, something outside of the

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dying declaration hearsay exception may have a similar foundation. *Cf.* Desmond Manderson, *Et Lex Perpetua: Dying Declarations and Mozart's Requiem*, 20 CARDOZO L. REV. 1621, 1623 (1999) (characterizing the dying declaration exception as a "moral necessity").

51. If the victim is a testifying witness, of course, then her character for sincerity is relevant to determining whether her testimony is truthful. *See* FED. R. EVID. 608, 609. In "whodunit" cases generally, however, the defense is less interested in attacking the victim's sincerity (given the concession that he truly is a victim and that a crime really did take place) than in raising doubts about the victim's capacity to perceive and to remember accurately the identity of the perpetrator.

52. FED. R. EVID. 404 (a)(2) (admitting evidence of only a "*pertinent* trait of character of the alleged victim" (emphasis added)).

53. Moreover, admitting evidence that the victim was a bad person creates a risk that the jury might excuse a person who harms such a victim. The jury, in other words, might see poetic justice in the defendant's causing harm to the victim, even though the defendant's act was in no way legally defensible.

54. For a more detailed consideration of the admissibility of inflammatory

defendant's control inspires a harshness in the jury that does not logically correspond with the likelihood of defendant's guilt.

C. *The Witness's Character for Truthfulness*

The third exception to the propensity rule admits bad character evidence about the insincerity of testifying witnesses in every case, civil and criminal, and this exception receives detailed treatment in Federal Rules 608 and 609.[55] As in my earlier discussion of Rules 404 and 405, I focus here on the preliminary admissibility question under the "whodunit" versus "what was done" approach.

When a witness testifies, she does so under oath and thereby asks the jury to believe that she has honestly communicated the truth to the best of her knowledge. There are numerous ways to discredit even an honest witness. The witness may, for example, have misperceived or misremembered the event about which she is testifying. But in addition to evaluating her ability to observe and remember correctly, the jury needs to evaluate her sincerity. To do so, it is useful to consider evidence of past insincerity.

As in the "what was done" criminal case, there is no risk that learning about character traits will distract the jury from relevant but absent third parties who share the same character traits. A witness's inclination to lie makes it more likely that she is lying on this particular occasion, just as a criminal defendant's past inclination to

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photographs of victims in homicide trials, see, for example, State v. Chapple, 660 P.2d 1208, 1214–17 (Ariz. 1983); Ritchie v. State, 632 P.2d 1244, 1244–46 (Okla. 1981).

55. Rule 608(a) states:

> the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a).

Rule 609(a) states:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a). Rule 609(b) sets out time limits after which the evidence may generally not be used. Rule 609(c) states the effect of an annulment or pardon. *See* FED. R. EVID. 404(a)(3) (providing an exception to the character rule for veracity evidence about a testifying witness).

start fights makes it more likely that the defendant and not the victim started this particular fight. The number of violent people in the world outside the courtroom does not affect the defendant's likelihood of having started the fight. Similarly, the large number of insincere people outside the courtroom does not reduce the odds that the testifying witness is lying. The veracity exception to the character rule thus parallels the structure of the "what was done" criminal trial scenario and would continue to exist under the approach outlined in this Article.[56]

One aspect of Rule 609 that is noteworthy from the perspective of studying criminal trials is the bias in favor of the criminal defendant that we also saw in the rules governing defendant and victim propensity evidence generally. Under Rule 609(a)(2), convictions for crimes involving dishonesty or false statement are always admissible against any testifying witness. For crimes not specifically involving dishonesty or false statement, however, Rule 609(a)(1) provides that if a witness is a criminal defendant, the probative value of felony convictions admissible on the impeachment point must outweigh the danger of unfairly prejudicing the defendant.[57] When the witness is anyone other than the criminal defendant, in contrast, Rule 609 allows the judge to admit all felony convictions whose probative value is not *substantially outweighed by* its tendency to cause unfair prejudice.[58] As discussed earlier, however, because such evidence is arguably highly prejudicial without being especially probative, special protection for the defendant may well be in order here.[59]

When a witness has a prior conviction for a felony that was not a crime of dishonesty or false statement, the question whether to admit such a conviction to prove a witness's dishonesty is a controversial one, and Rule 609 represents a compromise between those who

56. Rule 608 does not allow for admission of evidence about a witness's good character for veracity until it has been attacked. FED. R. EVID. 608. This differs from my approach to defendant (and victim) character evidence, but it may be sensible in this context to assume that jurors take for granted a witness's sincerity unless and until it has been attacked. The jurors will, however, tend to question the character of the defendant and the victim in "what was done" cases, because of the conduct in which they are each alleged to have engaged. Offering positive sincerity evidence about a *witness* before any attack might therefore waste the court's time.

57. FED. R. EVID. 609(a)(1) (stating that "evidence that an accused has been convicted of [a felony] shall be admitted if the court determines that the *probative value of admitting this evidence outweighs its prejudicial effect to the accused*" (emphasis added)).

58. *Id.*

59. *See supra* p. 951.

would exclude it altogether and those who would uniformly admit it.[60] The pro-admissibility argument asserts that anyone who is disrespectful enough of the law to commit a felony would *a fortiori* be willing to lie under oath.[61] This argument holds that we simply cannot trust the sincerity of felons. Those who favor exclusion of a criminal defendant's prior convictions can point to the risk of jury retaliation as well as to the risk that the defendant might be unfairly presumed guilty on the basis of his criminal history, the same risks that account for the Rule 404 exclusion of propensity evidence generally.[62] It may indeed be the hope of unfair prejudice that motivates the prosecution to introduce such evidence.[63] And the threat of its introduction

60. A divided Congress debated fiercely over the probative value of prior conviction evidence before enacting Rule 609(a). Victor Gold, *Impeachment By Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2298 (1994). Presenting two sharply different versions of the same rule—one permitting broad admissibility, the other narrow admissibility of prior conviction evidence—Congress ultimately passed Rule 609. *Id.* at 2307–08. The passage of the Rule has been described as follows:

> The [Conference] Committee compromised by making crimes involving dishonesty or false statement admissible with no discretion to exclude for unfair prejudice, while also making admissible felony convictions for crimes not involving dishonesty or false statement but only if probative value outweighed unfair prejudice to the defendant. Apparently exhausted, both houses acceded and enacted Rule 609(a).

Id. (footnotes omitted).

61. *See* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 803–04 (1993) (stating that the "ancient assumption from which the rule [permitting impeachment by prior felonies] was born" is that "[f]elons of all descriptions are forever afterward less truthful than other folk on any subject"); James McMahon, Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1065–66 (1986) (stating that the practice of allowing impeachment by prior felonies "[r]ests on the arguably tenuous theory that prior criminal activity relates to veracity . . . [and that] a person who has committed a crime may have less of a general propensity for truthfulness than a person with no prior criminal record").

This reasoning is implicit in the division of admissible convictions into two categories: those that are admissible by virtue of their content (a crime of deception or false statement, *see* FED. R. EVID. 609(a)(2)), and those that are admissible by virtue of their seriousness (a crime punishable by death or imprisonment for over a year, *see* FED. R. EVID. 609(a)(1)).

62. *See* Alan D. Hornstein, *Between a Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 9 (1997) ("The defendant having previously sinned, a jury may well conclude either that the defendant is more likely to have sinned on this occasion or that the defendant should be removed from society regardless of her guilt of the instant offense."); Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 248 (1970) (criticizing this form of impeachment).

63. *See* MUELLER & KIRKPATRICK, *supra* note 26, at 612 ("[C]onvictions are far more often used to impeach witnesses in criminal prosecutions than in civil cases and seem

pressures many defendants to choose between risking unfair prejudice by testifying and foregoing the right to testify on their own behalf.[64]

IV. THE RAPE DEFENDANT'S CHARACTER WITHIN THE CATEGORIES

With the "whodunit" versus "what was done" typology in mind, let us turn now to the most recently enacted character rule exceptions, Rules 413–415.[65] Congress passed these rules in conjunction with the Violence Against Women Act (VAWA), a statute that, among other things, provided a federal cause of action

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most often to be used to impeach the accused when he testifies in his own defense."); *cf.* Amina Quargnali-Linsley, *Evidence Law-Boundaries, Balancing, and Prior Felony Convictions: Federal Rule of Evidence 403 After* United States v. Old Chief, 28 N.M. L. REV. 583, 601 (1998) (stating that in cases like *Old Chief*, the prosecutor's real motivation for introducing prior conviction evidence may have been to prove the defendant's bad character and not to create a persuasive narrative, as the prosecution claimed); Kathryn Cameron Walton, Note, *An Exercise in Sound Discretion:* Old Chief v. United States, 76 N.C. L. REV. 1053, 1091–92 n.262 (1998) (stating that a prejudicial motive in *Old Chief* was likely because prosecutors are aware of the fact that a juror will have fewer regrets about convicting once they learn of a defendant's prior criminal record (citing Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 228 (describing "the persistence of lawyers, especially prosecutors, in attempting to load the record with inflammatory information they hope will move the jury"))).

64. *See* Hornstein, *supra* note 62, at 62 n.4 (stating that "if the defendant elects not to testify, the probability of conviction . . . increases dramatically"); *see also* Ohler v. United States, 529 U.S. 753, 759–60 (2000) (holding that a testifying defendant who preemptively introduces a prior conviction ruled admissible on a motion in limine waives the right to challenge the in limine ruling on appeal); Luce v. United States, 469 U.S. 38, 43 (1984) (holding that unless a defendant testifies, he waives the right to appeal a trial judge's erroneous decision in limine to allow prior conviction impeachment of the defendant, should he testify); Bryden & Park, *supra* note 28, at 536 (discussing how absurd the rules are to admit prior nondeception crimes of a defendant to prove insincerity—to which they are only marginally relevant, at best—but to instruct the jury not to consider the crimes as they bear on the odds of guilt, a far more probative use of such evidence that the jury is sure to consider, regardless of whether it is instructed to do so). Bryden and Park argue persuasively as well that the pressure on a defendant to say "I am innocent" is so great that he will lie if he is guilty, even if he is generally honest, and he will tell the truth if he is innocent, even if he is generally dishonest. *See id.* at 536. His honesty or dishonesty is thus of no real utility in determining whether his testimony is truthful:

> If the accused is innocent of the crime at bar, then prior conviction impeachment defeats justice because it makes his denial appear false when it is not. If the accused is guilty, then prior conviction impeachment still does not illuminate his truthfulness unless one assumes that a guilty person with a clean record would be less likely to lie to obtain an acquittal. In view of the guilty defendant's strong incentive to lie on the stand, it is doubtful that those with clean records are much more credible than those with prior convictions.

Id. at 536–37.

65. FED. R. EVID. 413–415.

for victims of gender-motivated violence.[66] As part of a political compromise surrounding the passage of VAWA, Congress enacted three new exceptions to the character rule, allowing for anti-defendant evidence in cases of rape and child molestation. Commentators almost uniformly criticized these rules as an indefensible product of political logrolling.[67]

To some extent, the rules deserve to be criticized. The introduction of negative character evidence about the defendant will not advance the search for truth in every rape and child molestation trial. Most rape trials, for example, are of "stranger rapes."[68] When a

66. 42 U.S.C. § 13981 (1994). The United States Supreme Court has invalidated part of the statute on the ground that Congress exceeded its constitutional authority in passing the legislation. United States v. Morrison, 529 U.S. 598, 626–27 (2000) (invalidating the civil remedy portion of VAWA).

67. *See* MUELLER & KIRKPATRICK, *supra* note 26, at 495 ("FRE 413–415 came as part of a politically charged crime bill, apparently added at the last minute in a Conference Committee in order to win votes in the House that were crucial to passage."). Various groups strongly opposed Rules 413–415, among them the Advisory Committee of the Federal Judicial Conference, the Standing Committee of the Judicial Conference, and the American Bar Association House of Delegates. *See id.* at 495–96; *see also* Ellis, *supra* note 21, at 975 (arguing that in enacting Rules 413–415, "Congress was more interested in appeasing the political cries of the public, rather than providing reasonable legislation"); Anne Elsbury Kyl, Note, *The Propriety of Propensity: The Effect and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 659 (1995) (characterizing Rules 413–415 as the result of "extensive negotiations between Reps. [Susan] Molinari [of New York] and [Jon] Kyl [of Arizona] and the House Democratic leadership"); *cf.* Aluise, *supra* note 11, at 159 (discussing how Congress established an unusual mechanism for the accelerated passage of these rules and stating that "Rules 413–415 can be viewed as a political response to a troubling problem that received widespread attention from the popular press").

68. *See* Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 489 n.10 (1991); *see also* Bryden & Lengnick, *supra* note 40, at 1214 (noting that "[r]eported and prosecuted rape cases are disproportionately stranger rapes"). By "stranger rapes," I mean rapes in which the victim is not acquainted with the perpetrator, either socially, through work, or otherwise. Compare this with data that in 1999, only three out of ten rapes were committed by strangers. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Characteristics of Crime, *at* http://www.ojp.usdoj.gov/bjs/cvict_c.htm (last visited Mar. 22, 2001) (on file with the North Carolina Law Review). Bryden and Lengnick note:

> Some authors argue that attrition statistics, which do not distinguish between stranger and acquaintance rape, mask official bias against victims of acquaintance rape. When separate tabulations are made for different types of rape, the picture changes, often dramatically. A study of Travis County, Texas, found that the probability of indictment was much higher in stranger rape cases (58%) than in acquaintance rape cases (29%). A study of felony filings in Hawaii reached similar conclusions. Of cases dismissed, 50% involved acquaintances, 38% persons who had just met, and only 12% strangers. Of those cases in which felonies were filed, only 28% involved acquaintances, 20% persons who had just met, and 49% strangers.

Bryden & Lengnick, *supra* note 40, at 1214 (footnotes omitted).

defendant stands trial for a typical stranger rape, he effectively concedes that someone committed a rape against the victim, but disputes that *he* was the one who did it. In other words, stranger rape prosecutions are typically of the "whodunit" variety. Given this fact, evidence that the defendant committed rape in the past would generate the cognitive distortions in the courtroom setting that make negative character evidence about "whodunit" criminal defendants unfairly prejudicial and only minimally probative.[69] The same could be said for at least some child molestation cases, in which the molester's identity is in question. Thus, for the "whodunit" cases, the new federal rules open the door to inappropriate defendant propensity evidence.[70]

Consider now the "what was done" category of acquaintance rape and child molestation cases. In these cases, evidence of the defendant's propensity for rape or for child molestation is highly relevant. In an acquaintance rape trial, for example, we know that either the accuser or the defendant has done something reprehensible. One possibility is that the accuser has lodged a false complaint of rape against the defendant and is pursuing an unjust conviction of an innocent person. The alternative is that the defendant has raped the accuser—a cruel and abhorrent act of violation with devastating consequences for the victim.[71] Evidence that the defendant has demonstrated a propensity for sexual assault in the past makes it far more likely that the bad actor in the courtroom drama is the defendant as opposed to his accuser.[72]

When a child accuses an acquaintance of molesting him, we must consider the unfortunate reality that children can be unusually

69. *See supra* text accompanying notes 36–39.

70. Professor Roger Park has also criticized Rules 413–415 when applied to stranger rape cases. Park, *supra* note 37, at 271–72 n.3. He argues that "[a]llowing free proof of propensity to rape in stranger rape cases would create a startling anomaly in the law of evidence," and that "[n]othing in common sense or systematic study justifies [the] distinction" between stranger rapes and stranger robberies, murders, or other crimes. *Id.*

71. *See* Donald Dripps et al., *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 158 (1994) (noting that victims of acquaintance rape often indicate a psychological harm stemming from a feeling of betrayal, "because the victim has been attacked by someone in whom she has placed her trust and confidence"); Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291, 308 n.90 (1995) ("[A]cquaintance rape may cause victims worse psychological damage because they are harmed by persons they trust." (citing Nancy E. Roman, *Scales of Justice Weigh Tiers of Sexual Assault; State May Reform Rape Law*, WASH. TIMES, June 16, 1994, at A8 (reporting based on an interview with Kathryn Kolbert, Vice President of the Center of Reproductive Law and Strategy))).

72. For a discussion of the implications of this categorical approach for rape victim propensity evidence, see *infra* Part V.

susceptible to the power of suggestion and may also confuse fantasy with reality.[73] These phenomena—when brought to the attention of a jury—can stand as an obstacle to conviction. In such cases, either the child is under adult influence (or is lying) or the defendant is guilty of an extremely serious offense. Learning that the defendant has a propensity for acts of child molestation greatly increases the plausibility of the latter alternative. In this class of cases, as in the consent-defense rape context, the new rules of evidence therefore make a good deal of sense.

Rules 413–415 are, in other words, over-inclusive for covering "whodunit" sexual offenses, and they are under-inclusive for failing to cover non-rape and non-molestation trials of the "what was done" variety.

I have argued that consent-defense rape cases are a species of the "what was done" scenario and should be treated as such. A different view, one advanced by Professor Roger Park, is that harmful defendant propensity evidence should be *uniquely* admissible in consent-defense rape cases. He makes two arguments in support of this claim. First, Park suggests that, in criminal cases other than consent-defense rape, the admissibility of defendant propensity evidence could deter the police from undertaking an adequate investigation of physical evidence.[74] Second, he proposes that harmful defendant propensity evidence is uniquely probative in consent-defense rape cases.[75] Let us examine each argument in turn.

In an article co-authored with Professor David Bryden, Park voices the concern that, in the run of cases, a rule admitting a defendant's criminal record would diminish police motivation to do a thorough investigation, because the prosecutor could simply rely on propensity evidence to convict the defendant. In consent-defense rape cases, this worry is absent because, "[a]side from the testimony of the alleged victim, the uncharged misconduct [i.e., prior rapes] is

73. *See* Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385, 1386 (1997) (noting that some psychoanalytic experts argue that children can state their fantasies as if they were true allegations). In addition to projecting fantasy as reality, there are also developmental issues related to children's memory retrieval that may make a child's recollection appear to be incorrect. *See* Julie A. Dale, Comment, *Ensuring Reliable Testimony From Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 ALB. L. REV. 187, 192–93 (1993) (discussing how a child's level of developmental maturity can affect the ability to retrieve and repeat accurate information from memory, even though the child's memories may themselves be accurate).

74. Park, *supra* note 37, at 273.

75. *Id.* at 272.

likely to be the best evidence available."[76] For this reason, the authors urge the admission of such evidence in consent-defense rape trials.

The worry that admitting propensity evidence in criminal trials, other than those for consent-defense rape, will reduce the incentive for police to do adequate investigation does not seem well-founded. The police often, for instance, will not have any particular suspect in mind at the very beginning of an investigation. In the case of a stranger rape, for example, the police would be likely to encourage the victim to get a physical examination during which physical evidence called a "rape kit" would be collected.[77] Assembling samples of DNA and fingerprints can help to facilitate the process of identifying and capturing a suspect.

As the United States Supreme Court has observed, police zeal in the "often competitive enterprise of ferreting out crime"[78] is likely to drive police to gather much *more* evidence than is necessary once a suspect is in hand rather than to stop prematurely at less evidence than is necessary.[79] The accused similarly has every reason to try to build a defensive case based on physical evidence and to point out police sloppiness and omissions to the jury.[80] Park and Bryden are therefore mistaken in thinking that consent-defense cases, on the one hand, and stranger rape along with all remaining criminal cases, on the other, provide distinct evidence-gathering incentives. The admissibility of propensity evidence in consent-defense rape cases

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76. Bryden & Park, *supra* note 28, at 579.

77. *See e.g.*, United States v. Boyles, 57 F.3d 535, 538 n.2 (7th Cir. 1995) ("A 'rape kit' is the name of the product frequently employed for the examination of a sexual assault victim in which pubic hair, blood samples, swabs, and specimens from various parts of the victim's body and clothing are collected and retained for further forensic examination and evaluation.").

78. Johnson v. United States, 333 U.S. 10, 14 (1948) (recognizing that police have a particular interest in criminal justice and espousing the need for a "neutral and detached magistrate" to make the decision whether or not to issue a warrant).

79. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 481 (1966). In *Miranda*, Chief Justice Warren stated:

> Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions. In each case authorities conducted interrogations ranging up to five days in duration *despite the presence, through standard investigating practices, of considerable evidence against each defendant.*

Id. (emphasis added).

80. In the O.J. Simpson case, for example, defense attorney Johnny Cochran argued that the Los Angeles Police Department was corrupt and cited several examples of poor police investigation in gathering the evidence relied on by the prosecution. *See* JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON 255–56, 281 (1996).

should turn only on its high probative value and corresponding reduced danger of undue prejudice, not on any special departure from concerns about police disincentives to investigate.[81]

In addition to making the incentive argument, Park has elsewhere argued that propensity evidence is uniquely probative in consent-defense rape cases.[82] Unlike my theory of "what was done" cases, the Park approach to this evidence turns on the presence of what he calls "a credibility contest"[83] or a "he says/she says" situation in the consent-defense rape scenario.[84]

Park makes a flawed assumption in distinguishing consent-defense rape cases from all other criminal cases. Though consent-defense rape cases may often involve a credibility contest, they do not invariably do so. As Park acknowledges in the article co-authored with Bryden, "[i]n some cases the complaining witness's version of events is partially corroborated by physical evidence such as bruises."[85] In addition or alternatively, bystanders might have seen or heard something material to the case. Importantly, even when a particular consent-defense rape case does not boil down to a credibility contest alone, harmful propensity evidence about the defendant remains highly probative. The defendant's rape history supports the plausibility of the complainant's claim that the defendant raped her and thus reduces the plausibility of his claim that her accusation is false. For that reason, rather than because of some unique "he said/she said" controversy, the defendant's rape history ought to be admissible.

Under my two-category approach, propensity evidence is highly relevant and not unduly prejudicial whenever the risk of mistaken identity has been eliminated from the equation, i.e., in the "what was done" scenario. What makes propensity evidence against the defendant questionable and unfairly prejudicial in "whodunit" cases

81. There may be some cases in which there is so much pressure to "get" someone that police settle on a suspect and do as little further investigation as possible. For such cases, character evidence might be the difference between police looking for more evidence and suspects, and their resting on their laurels. There is no reason to expect, however, that this would happen generally in all criminal cases that are not consent-defense rapes.

82. On the probative value question, Roger Park suggests that "consent-defense cases are different enough from other criminal cases to justify admitting evidence of propensity to rape." Park, *supra* note 37, at 277.

83. *Id.* at 273.

84. Park explains that although drug sting operations might theoretically also present such a "swearing contest" scenario, this could be avoided by better police planning ahead of time. *Id.* at 273–74.

85. Bryden & Park, *supra* note 28, at 578.

is the misleading salience of the defendant in the courtroom as compared with all other people who share his propensity for wrongdoing. In the "whodunit" case, the jury is likely to undervalue the probability that one of the many *other* people with a criminal predisposition might have committed this offense. Park and his co-authors do not discuss or take into account this crucial undue prejudice problem shared by all (and only) the "whodunit" cases. The "what was done" scenario does not give rise to this problem, because there is a consensus between the parties about the identity of the involved actors and thus no absent group of suspects for the jury to overlook. Such a consensus has the same logical consequences in an assault or murder case in which the defendant claims self-defense or defense of others, as it does in a consent-defense rape case.

Consider the homicide case in which the defendant claims that she was actually trying (unsuccessfully) to stop the victim from killing himself. An eyewitness might testify that he saw the defendant shove the victim into the path of an oncoming train. The defendant might then point out that the eyewitness does not see well and therefore mistook for a shove her unsuccessful attempt to prevent the victim from jumping off the platform. Such a case would fall into the "what was done" class of scenarios because the disagreement is not about who was involved but about what transpired between the involved actors. As such, it would be helpful to learn that the defendant has killed or tried to kill other people before just as it would be helpful in the other direction to learn that the victim had previously attempted suicide.

In the above example, there is no swearing contest. No one suggests that the witness is lying, only that the witness misperceived what occurred. What matters, then, is not whether there is a swearing contest but whether there is a misleading salience that inflates the apparent relevance of character evidence. Notably, there is none here, because neither party disputes that the defendant was involved in the transaction in question. The only question is what the victim and the defendant were doing. In short, the principles that make harmful defendant propensity evidence highly relevant in consent-defense rape cases apply to all "what was done" scenarios, and the swearing contest that characterizes some but not all consent-defense rape cases proves to be neither necessary nor sufficient to the application of these principles.

V. A DEFENSE OF THE RAPE SHIELD LAW: RAPE VICTIMS' CHARACTER IN "WHAT WAS DONE" CASES

Comparing the consent-defense rape case with other "what was done" scenarios such as self-defense assault might seem to imply that there is nothing special about propensity evidence in rape trials. Given this potential implication, I must explore what my theory has to say about the fact that rape victim propensity evidence falls under a special evidentiary rule of exclusion—the rape shield law.

Rape shield laws prohibit the introduction of victim sexual propensity evidence in rape trials.[86] Defenders of rape shield laws contend that the admissibility of victim sexual character evidence deters rape victims from reporting the crime and that the recommended propensity inference both reflects and reinforces a reductionist division of women into "good girls"—those who do not engage in sexual relations outside of marriage—and "bad girls"—those who do (and who consequently "assume the risk" of being raped).[87] Though the various versions differ in their particulars, all states have enacted their own rape shield laws.[88]

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86. Rule 412, the federal rape shield law, provides that, with some exceptions, "[t]he following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . : (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition." FED. R. EVID. 412; *see* United States v. Powell, 226 F.3d 1181, 1196–97 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1128 (2000).

87. *See* Elizabeth J. Kramer, Note, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 303–10 (1998) (stating that rape shield laws were enacted in the 1970s to help increase the number of rapes women reported, to recognize the "lack of probative value" in admitting prior consensual acts during trials, as well as the "lack of connection between chastity and truthfulness," and to reduce acquittals which occur because of the introduction of a victim's sexual history); *cf.* Bryden & Lengnick, *supra* note 40, at 1355 (noting that in both England and the United States, rape prosecutions in which the victim was a virgin were successful ninety-four percent of the time, whereas in those cases in which a victim's "sexual reputation was markedly discredited during the trial," the success rate was only forty-eight percent).

Because rape cases are most often litigated in state court, the federal rape shield law has served more as a prototype for state legislation than as applicable law in federal court. In some cases, however, federal courts do have jurisdiction over what are essentially state crimes (including rapes) when they occur in federal enclaves such as Indian reservations. *See e.g.*, United States v. Wheeler, 435 U.S. 313, 333 (1978) (allowing the federal prosecution of the defendant for a statutory rape that occurred on an Indian reservation).

88. The federal rape shield law, Rule 412, was adopted in 1978 and then amended in 1994. As of this writing, every one of the States has a version of the rape shield law. *See* Bopst, *supra* note 17, at 131–32 n.32 (1998) (listing the forty-nine state rape-shield statutes and the federal rape shield law in existence at that time). The last state to pass a rape shield law, Arizona, did so in 1998. *See* ARIZ. REV. STAT. § 13-1421 (West 1998 & Supp.

Rule 412 contains three exceptions. First, evidence that a third party might have been the source of semen or injury is admissible.[89] Second, evidence of prior sexual relations between the victim and the accused is admissible to prove consent.[90] Third, any evidence whose admissibility is guaranteed to the defendant by the United States Constitution is admissible.[91]

In evaluating the rape shield law, let us first consider the overall relevance of evidence regarding a rape complainant's "propensity to consent to sexual relations." Such predisposition evidence appears structurally to resemble evidence admitted in the "what was done" scenario discussed above. As in a self-defense assault case, we know who the relevant actors are, and the only open question is exactly what occurred between them. The evidentiary argument generally barred by the rape shield law is this: the victim has been consensually sexually active with other men in the past, and therefore it is more likely (than it would be in the absence of this sexual propensity evidence) that she also consented to sexual intercourse with this defendant.

Feminists have long battled this inference, arguing that there is no general "character for consenting" that would help us predict whether a victim in a rape trial was likely to have consented to intercourse with her alleged rapist.[92] The notion that women can be divided into "madonnas" and "whores" based upon their sexual choices is repugnant and seems to go hand in hand with a "no means yes" philosophy and other efforts to deny women sexual agency.[93]

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States vary in what they exclude under their respective rape shield laws. *See generally* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 906–07 (1986) (providing a table listing the rape shield laws of forty-eight states and sorting them by their attributes).

89. FED. R. EVID. 412(b)(1)(A).

90. *Id.* at 412(b)(1)(B).

91. *Id.* at 412(b)(1)(C). Though my focus here is on criminal cases, Rule 412 provides some protection against the admission of sexual propensity evidence in civil cases as well. In civil cases, Rule 412 provides that evidence of a victim's sexual history is admissible only if its probative value substantially outweighs its tendency to harm any victim or cause unfair prejudice to any party. *Id.* at 412(b)(2).

92. *See, e.g.*, CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989) (describing and objecting to the division of women into "spheres of consent").

93. *See* Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 809 (1996). Ross discusses the myth that "if a woman has previously consented to have extramarital sex, she is promiscuous and probably will consent to have sex with any man who asks." *Id.* She further notes that this myth that women are either "madonnas or whores" contributes to the poor conviction

Some commentators, however, have held firm in the view that sexual predisposition evidence is relevant and would contribute, at least in the acquaintance rape context, to a determination of what actually happened on the night in question.[94] These commentators might consider the victim's sexual character in a rape case to be just as probative on the question of victim consent as an aggravated assault victim's violent character would be on the question of self-defense. The similar structure of these two "what was done" inquiries into character appears to support the analogy between rape and other crimes.

A. Victim Propensity: Rape vs. Other Crimes

No one has yet adequately defended the distinction between a victim's violent character in a self-defense assault (or homicide) case—fair game for the defense—and a victim's sexual predisposition or character in a consent-defense rape case—off-limits to the defense. Perhaps for this reason, one might think that there is no logical distinction. If we study the two kinds of cases closely, however, an important difference emerges that logically, rather than politically, justifies the rape shield exception to the usual admissibility of victim character evidence. This difference, moreover, does not diminish the relevance and utility of negative *defendant* propensity evidence in both types of "what was done" scenarios. Finally, in prosecutions for both consent-defense rape and self-defense assault, there is a place

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levels of acquaintance rapes. *See id.* at 809 n.47 (citation omitted); *see also* Donna L. Laddy, McGregor Electronic Industries*: A Per Se Rule Against Admitting Evidence of General Sexual Expression as a Defense to Sexual Harassment Claims*, 78 IOWA L. REV. 939, 958 n.134 (1993) ("Often courts fit women into one of two categories—good girl or bad girl—without taking into account the complexity of differences in women." (citations omitted)).

94. *See* MUELLER & KIRKPATRICK, *supra* note 26, at 492–95. Commenting on the Rule 412 restrictions on the admission of a victim's sexual history, Mueller and Kirkpatrick write:

> That such evidence *often* has little or no bearing on the question whether a person consented to engage in sex on a particular occasion seems . . . to be true. But it is not clear that such evidence is never relevant in sexual assault cases, and the operation of rape shield rules and statutes presents some difficulties.

Id. at 492–93. As a situation in which "circumstances lend at least some credibility to defense claims of consent and in which the woman was a 'victim' only if she is speaking the truth and defendant is lying," the authors ask us to "[c]onsider now, not the case in which a woman is suddenly assaulted on the street or in her home by a person she has never seen before," but an acquaintance rape claim. *Id.* at 493; *see also* Charles C. Crawford & Marc A. Johnston, *An Evolutionary Model of Courtship and Mating as Social Exchange: Implications for Rape Law Reform*, 39 JURIMETRICS J. 181, 199–200 (1999) (explaining that in acquaintance rape cases in which the evidence favoring conviction is not overwhelming, judges and jurors tend to view the victim's sexual history as relevant).

for the introduction of harmful victim propensity evidence, albeit of a different sort than the sexual propensity evidence barred by the rape shield law.

When a defendant claims self-defense in a prosecution for aggravated assault, he asserts that his victim behaved in a manner that momentarily released the defendant from the usual rule prohibiting aggravated assault. In some sense, the victim can be said by her behavior to have temporarily forfeited the legal right not to be physically harmed. It follows that, in such trials, either the defendant or the victim behaved in an unjustifiably violent manner, the relative likelihood of which can be illuminated by reference to their respective histories of unjustified violence.[95]

Compare the assault prosecution with the consent-defense rape trial. When an accused rapist asserts that the victim consented to sexual intercourse, it is not the case that either the defendant behaved unjustifiably by committing a rape or the victim behaved unjustifiably by consenting to sexual intercourse. In other words, there is not the symmetrical potential for violent behavior on either side that we saw in the non-sexual assault context. If there was no rape, then no one acted wrongfully on the night in question. The victim's sexual character, then, unlike the assault victim's violent character, fails to give the jury a likely true perpetrator to substitute for the accused. As we will see, this asymmetry has implications for the relative utility of different kinds of victim character evidence in "what was done" cases.

This point alone, however, does not necessarily dispose of the probative value of sexual predisposition evidence, even if we reject the notion that sexually active women are "whores" who somehow waive their entitlement to refuse consent to sexual relations.[96] After all, most behavior can be classified along a continuum, and knowing

95. Of course, there could be the occasional case in which an assault victim harmed the assailant in the reasonable but mistaken belief that the assailant was about to attack the victim. In such a case, the assailant might subsequently have attacked the victim in the correct belief that the attack was necessary to avoid being harmed. If this were to happen, neither the assailant nor the victim would have behaved badly. Even in such a case, however, each party would likely contend that the other's actions were unreasonable and unjustifiable, and thus, character for violence would not—at the fact-finding stage—be eliminated from the equation.

96. Note that a prostitute does not, by virtue of her profession, waive the right to refuse consent on any particular occasion, from either a legal or a moral standpoint. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *212–13 (distinguishing between Roman law and English law in this regard); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 153 n.154 (1994) ("[R]ape should not be considered less serious when the victims are prostitutes.").

where an individual falls along that continuum generally helps us predict what that individual will do on a particular occasion. If X (female) and Y (male) went out on a date, for example, and we wished to place bets on whether X decided to have sex with Y on this date, the knowledge that X regularly decides to have sex with each new man whom she dates would help us calculate the odds, even if we passed no normative judgments upon either X or Y.[97]

B. *The Conditional Irrelevance of Victim Sexual Propensity*

If sexual predisposition is a meaningful construct, then why not admit it against the victim in consent-defense rape cases? The answer is that once there is a rape prosecution, we have a piece of information whose significance overwhelms any relevance that the sexual propensity data would have—the victim swears that, on the occasion in question, she did not consent. Consider what this means. A person who is in a physical confrontation with another has a built-in incentive—wanting to seem like a peaceful person—to say that the other person started the fight, regardless of whether it is true. That is the status of our defendant and victim in the self-defense assault case. Each one wants to characterize the fight as the other person's fault. The woman who consents to sexual intercourse, however, has no systematic incentive to claim that what occurred was actually a rape. Indeed, she is subject to a stigma if she openly makes a rape accusation.[98]

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97. Similarly, in calculating whether a child ate a slice of pizza left in the refrigerator (without actually looking in the refrigerator), it is useful to know that the child loves pizza and tends to consume it regularly when it is around.

98. *See* Sherry F. Colb, *Assuming Facts Not in Evidence*, 25 RUTGERS L.J. 745, 755 (1994) ("[R]ape victims ... are reluctant to talk to friends and family. We know from psychologists that the reasons for this, though varied, stem in part from the stigma attaching to victims that makes rape a virtually unique crime."); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 813 (1991) ("[F]ar from protecting women, rape prosecutions served to stigmatize all but a few as liars and whores, as vindictive and spiteful, as villains rather than victims."); *see also* Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1333 (1994) (explaining how expert testimony can "explain a woman's [initial] failure to report rape, not as a symptom, but in terms of the likelihood of disbelief by police, retaliation by the rapist, hostility of family and support network, and the stress caused by the judicial proceedings and stigma of being a public rape 'victim' ").

Of course, a person who has consensual sex—such as an adulterous wife who has a jealous and violent husband—might have an incentive to portray the event as a rape. If a victim-witness has such a motive, then the defense can offer evidence of it in the particular case. *See, e.g.*, Olden v. Kentucky, 488 U.S. 227, 232–33 (1988) (holding that a state court decision to exclude the victim's live-in relationship with her boyfriend violated the Confrontation Clause when the defense theory explained the rape charge as concocted to preserve the victim's relationship with her boyfriend). It does not follow, however, that

Several things follow from the distinction between victim propensity evidence in rape and assault cases. First, we would expect that each of two participants in a violent altercation would claim that the other one started the fight and thereby provoked justifiable defensive action.[99] Second, and as a result, we would probably not separately judge the initiator of the fight much more harshly for falsely accusing his victim than we would for the assault itself. The primary bad act in an assault, in other words, is the unjustified violence—whether by the defendant or by the putative victim—not the self-interested and predictable false claim by one of the two that his own violence was undertaken in justifiable self-defense.

In the consent-defense rape case, by contrast, we would not expect a person—regardless of whether she is sexually active—to claim falsely that a consensual sexual act in which she participated was actually a rape. Unlike a participant in a fight, for example, who runs the risk of prosecution for assault if he does not claim assault, she does run a risk of being prosecuted for consenting to sexual relations if she does not claim rape. To make a rape accusation falsely thus represents an act of significant treachery and dishonesty. The false rape accuser is accordingly a bad (and deviant) actor *not* for having had consensual sex in the first place, but for having later made a false accusation about it.[100]

In the "whodunit" scenario, recall that the defendant's innocence is entirely consistent with the victim-witness having done nothing reprehensible or deviant. An eyewitness's honest identification error could explain the prosecution of the wrong person. Recall that the victim's character is also completely irrelevant in the "whodunit" case, because both parties concede that a crime took place. Introducing character evidence about either the defendant or the victim therefore risks confusing the jury with little or no fair payoff in the "whodunit" case. Contrast the two "what was done" cases we have been examining, consent-defense rape and self-defense assault. In each case, one of two people—the defendant or the complainant—

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having consensual sex, in and of itself, gives rise to an incentive for women to characterize the sex as forced; indeed, the opposite is true. This distinguishes the status of rape victim from the status of assault victim, in which a combatant has a built-in motive to say that the other person was the assailant and he the innocent victim.

99. *See* Bryden & Lengnick, *supra* note 40, at 1324 (stating that in self-defense assault cases, there is a race to the courthouse and whoever gets there first is the "victim").

100. Perhaps this was less true at a time when it was generally considered shameful to have consensual sex outside of marriage—although even then, that fact would be irrelevant where the rape accusation itself is what brought the intercourse to light.

has done something very wrong. Because we must select a villain, each individual's character becomes highly relevant.

Unlike the self-defense assault case, however, where the relevant victim character trait would be manifest during the alleged attack, the relevant victim-character dimensions in the consent-defense rape case are the dishonesty and vindictiveness manifested at the time of the later accusation and not a propensity to consent to sexual activity manifest at the time of the alleged offense. To put it differently, it is no more likely that a sexually active woman would carry out such a scurrilous act of false rape accusation than that a woman less sexually experienced would do so. The informative value of an inclination to consent to sexual activity thus vanishes once a woman has leveled an accusation of rape against a man.

Consider the following analogy. John works for a corporation that runs semi-annual blood drives in its cafeteria. In the past, John has donated blood on a regular basis. In the first blood drive of 2001, however, John feels somewhat queasy and decides not to donate this time. He walks through the cafeteria, thinking that he might like a glass of the orange juice the Red Cross typically provides at blood drives.

As he approaches the blood booth, John feels a tap on his shoulder. Turning around, he notices the blood technician George and says, "Hello." The technician asks whether John will be donating this year, and John responds that he will not. George then grabs John and straps him to a gurney. He proceeds to pierce John's vein with a needle and then hook up the needle to a standard one-pint blood collection bag. Throughout this procedure, John struggles and repeatedly implores George not to do this.

Assume now that the state brings criminal charges for aggravated assault against George. The situation represents a "what was done" scenario. There is no question about whether George took blood from John. The only controverted issue is whether or not the taking of this blood was consensual. The defense claims that John agreed to permit George to take his blood. The prosecution claims that George forced John to give blood while John refused consent and pleaded with George to stop.

One of the two men has done something terribly wrong. Either George has committed a deplorable assault on John, or John has directed a slanderous criminal accusation against George. There is not, however, the kind of symmetry of harms present in the self-defense assault case: if John consented to the taking of his blood, it is

his later false accusation (and not his original consent to give blood) that is reprehensible and deviant.

To determine which of the two competing factual accounts here is accurate, we might wish to know something about what each of the men is capable of doing. In the case of George, learning that he has violently assaulted people in the past would be informative. Even more informative would be learning that he has previously forced unwilling persons to donate blood. With respect to John, the victim of George's alleged assault, it would be useful to know whether John has ever made false criminal accusations against anyone in the past and whether John is generally dishonest.

That John has in previous years donated blood consensually would not constitute probative defense evidence. Consider why this is so. If we were trying to determine whether a random person at John's corporation, Jane, consensually donated blood at this year's drive, knowing nothing else, we would surely consider her past practice of donating blood relevant to our inquiry. The difference between Jane and John, however, is in the salient fact that only John claims to have been forced to donate blood on this occasion. The fact of John's claim overwhelms any relevance of John's past donation practices.

In describing this phenomenon, we might say that John's past donation practices are *conditionally irrelevant*, the condition being the fact of his accusation regarding this occasion. The plausibility of his claim that he was forced to donate on this occasion does not turn on his propensity for donating blood in the past. A frequent donor is, in other words, no more likely to make a false accusation of forcible donation than a less frequent donor. The plausibility of the accusation rests instead on John's credibility, on the one hand, and on George's propensity for violence or forcible blood taking, on the other.

Conditional irrelevance as a concept takes as its point of departure the principle of conditional relevance. As set out in Rule 104, some evidence is relevant only if certain factual preconditions are first satisfied.[101] If the government wants to offer a weapon into evidence as the murder weapon, for example, it first must demonstrate (such that a reasonable juror could conclude) that the

101. FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

weapon truly was the murder weapon. If there is insufficient evidence that the gun was the murder weapon, then the gun is not relevant to the case. It might actually be more accurate to say that the relevance of the gun to the case is conditioned on there being some possibility that it was the murder weapon, even if the possibility is too small to justify admitting the gun into evidence.[102]

To understand the interdependence of evidence in supporting relevance judgments, take the case in which a man stands trial for the murder of his wife. Assume that the prosecution offers evidence that the defendant was a wife-abuser. In attempting to bar the evidence, the defense might claim that of all men who abuse their wives, only a tiny fraction actually kill them.[103] With these odds, it would seem that the defendant's battering is not highly probative evidence, even if the odds of a non-abusive husband killing his wife are even slimmer. Add, however, the fact that the victim in the particular case was murdered, and the abuse evidence takes on a greater significance.[104] Of women who were murdered and whose husbands were wife-abusers, the actual odds that the husband killed the victim are nine to one.[105] Knowing that the victim was murdered increases dramatically the relevance of the husband's abuse history in determining whether or not he killed her. The abuse history would be far less relevant, for example, if we did not know whether she was dead. If we were trying to predict whether a battering husband whose wife is now alive would

102. *See* Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 873 (1992) ("In fact, neither [of two facts] is conditionally relevant upon the other, unless the probability of one of them is 0.0."). In this piece, Allen elaborates the case, presented over a decade earlier, for dismantling the doctrine of conditional relevancy. *See id.*; *see also* Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 469 (1980); Dale Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. Rev. 447, 448 (1990). I do not take a position in this Article on the advisability of retaining the conditional relevance doctrine. Nonetheless, I do accept and support one relatively uncontroversial premise of the doctrine—the idea that the probative value of one piece of evidence can vary depending on what other evidence is available. My theory of "conditional irrelevance" focuses on evidence that *reduces* rather than increases the probative value of other evidence.

103. *See* Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 723 n.13 (1998); *see also id.* (referring to an unsupported statistic reported by Alan Dershowitz on a television program that "only one in a thousand batterers goes on to kill" during an act of spousal abuse).

104. Based on Dershowitz's (probably flawed) assumption about the relation between spousal battery and abuse, using his own calculations, statistician I.J. Good estimated that if we know that a man is a batterer *and* that his wife has been murdered, "the probability is one-third to one-half that a battering husband murdered his wife." *Id.*

105. I.J. Good calculated that based on a batterer's actual "lifetime probability of murder," the likelihood is .9 that the batterer whose wife has been murdered was himself the one who killed her. *Id.*

kill his wife in the future, for instance, the odds of his doing so would be much lower than the odds that the batterer whose wife has been murdered was in fact the murderer.

Just as there are facts that can make the relatively irrelevant highly relevant, there are also facts that can reduce or eliminate the relevance of a given piece of evidence. For example, most homicides are committed by people who are of the same race as their victims.[106] Learning that the victim of a homicide is African American would thus be relevant to determining the race of the perpetrator. Accordingly, detectives might use evidence of the victim's race to help guide their investigation.

Once an eyewitness claims that she saw the attack in which the victim was killed, however, and that the assailant was a white man with blonde hair and blue eyes, the fact that the victim is African American is no longer probative of the assailant's race. To urge the conclusion that the killer was African American, one would have to attack the perception, memory, or honesty of the eyewitness rather than pointing to the fact that the *victim* was African American.

Similarly, in our blood-donation example above, until we know that John has accused George of forcing him to donate blood, John's history of giving blood certainly increases the odds that John voluntarily chose to give blood on this occasion. Once we know that John has made the accusation, however, John's donation history ceases to be probative. The two primary variables in determining what happened become John's insincerity and George's violence.

This discussion teaches an important lesson about the rape shield law. Evidence that a woman has chosen to have sex with many men in the past is not relevant to whether she consented on the occasion on which she claims she was raped. Once she has made an accusation, the fact of that accusation becomes salient and the relevant propensities become her propensity for making false accusations about rape or about other serious matters and the defendant's propensity for committing rapes. Any evidence suggesting a predisposition to engage in sexual activity would accordingly be irrelevant and just as illegitimate as the evidence in the blood donation example that John had previously donated blood on many occasions.[107]

106. Press Release, U.S. Dept. of Justice, Homicide Trends in the United States, http://www.ojp.usdoj.gov/bjs/pub/press/htius.pr (Jan. 2, 1999) (on file with the North Carolina Law Review) ("From 1976 though 1997, 85 percent of white murder victims were killed by whites and 94 percent of black victims were killed by blacks.").

107. Arguably, this should hold true even under the circumstances covered by the

One might defend the use of such evidence, whether of sexual or blood donation propensity, on the ground that that its relevance is not absolutely zero. If the victim tried to rule out even the possibility of consent by arguing, for example, that she would never agree to have sex or to donate blood, such evidence would surely be relevant.[108] If there is an inclination and therefore a potential for consent, the victim's consent to sex or blood donation is not ruled out. There is at least a theoretical plausibility to the defendant's story that there simply would not be if consent were utterly out of the question.

This objection is partially correct and may animate scholars who press for the admissibility of sexual history in consent-defense rape cases. The absence of any propensity to consent would be highly relevant. It would virtually rule out the possibility that the event was consensual and thereby eliminate even the need to assess the victim's credibility. The *presence* of such a propensity, however, is nonetheless virtually irrelevant when there has been a rape charge. That is, it is irrelevant except to the extent that it allows for the possibility of consent, a possibility that the victim in most cases does not deny. She does not, in other words, say that she *could not have* consented but swears instead that on this occasion, she *did not* consent. Under such circumstances, the relevance of an inclination to consent is vanishingly small. For this reason, I speak of it as irrelevant.

C. *Conditional Irrelevance and Ambiprobativity*

Others before me have attempted to argue the irrelevance of sexual promiscuity in rape cases. Prior arguments have been unconvincing, however, for making flawed assumptions about what makes rape cases different. As mentioned above,[109] some have denied that promiscuity is a meaningful dimension of human behavior. This denial does not seem well-founded, however, given

existing exception to the rape shield law for evidence about a victim's previous consensual relationship with the defendant. Her having consented to have sex with him in the past does not make her more likely to be leveling a false rape accusation against him on this occasion. Evidence about a pre-existing relationship between the defendant and the victim may be a necessary part of providing the context for the events in question, but specifying that their relationship was sexual need not be. The suggestion, implicit in the rule, that consent on prior occasions makes the victim's complaint less likely to be true, is therefore flawed, for the same reasons as I outline in criticizing the notion that sexual propensity evidence is relevant to rape cases generally.

108. Proving that the victim would never act in a particular way mirrors the pro-defendant character evidence exception in Rule 404 and would similarly open the door for evidence that the "would never do that" claim is inconsistent with the facts.

109. *See supra* note 92 and accompanying text.

that people do seem to differ from one another in this, as in other, inclinations.

A different commentator, Professor Roger Park, has made a more nuanced argument for the irrelevance of promiscuity evidence in rape cases. Park reaches his conclusion through a concept he calls "ambiprobativity," the position that evidence that a person is sexually active makes both consent and rape more likely and therefore—on net—lacks the relevance that would justify its admission. Though I sympathize with the result reached by Park, I reject the theory of ambiprobativity.

Professors David Bryden and Sonja Lengnick more elaborately develop the argument that sexual propensity evidence is ambiprobative in rape cases. They base this theory on the fact that "sexual permissiveness is associated with rape victimization."[110] As stated elsewhere by Bryden, this approach holds that "promiscuous women, though more likely to consent to sex than other women, are also more likely to be raped."[111]

The ambiprobativity argument works like this: If we know that a woman is unusually sexually active then, knowing nothing else, on any given day, we know that she is more likely than her less active sister to have consented to sexual activity. This inference seems legitimately to follow from the general proposition that past conduct is relevant evidence of future conduct.[112] Though some scholars have, as Bryden and Lengnick note, downplayed the relevance of a "propensity to consent,"[113] it seems apparent that across the universe of people, individuals' sexual proclivities fall along a continuum. Evidence of one's past behavior, in this as in other areas, is therefore—knowing nothing else—helpful in predicting one's future

110. Bryden & Lengnick, *supra* note 40, at 1357.

111. Bryden & Park, *supra* note 28, at 570.

112. *See* Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 7 BEHAV. SCI. & L. 521, 532 (1989) ("[B]ehavior science research . . . shows that, by and large, the best way to predict anybody's behavior is his behavior in the past."); *see also* Klassen & O'Connor, *supra* note 36, at 145. *But see* Orenstein, *supra* note 36, at 670.

113. *See* Bryden & Lengnick, *supra* note 40, at 1333 ("Some scholars point out that the woman's consent to sex on previous occasions does not 'prove' consent on the occasion in question."); *see, e.g.*, Garth E. Hire, *Holding Husbands and Lovers Accountable for Rape: Eliminating the "Defendant" Exception of Rape Shield Laws*, 5 S. CAL. REV. L. & WOMEN'S STUD. 591, 601 (1996) (arguing that past consent to intercourse with a man does not increase the odds of later consent to intercourse with that man); Tanya Bagne Marcketti, *Rape Shield Laws: Do They Shield the Children?*, 78 IOWA L. REV. 751, 754 (1993) ("Rape shield statutes evolved from society's recognition that a rape victim's prior sexual history is irrelevant to issues of consent.").

behavior. It is also helpful, for the same reasons, in ascertaining one's past behavior, given no other information.

In addition to raising the odds of a consensual encounter, the ambiprobativity argument points out that being sexually "permissive" positively correlates with the likelihood of being raped. This increased risk of rape might result from a tendency for the woman who has many different sexual partners to place herself more frequently in potentially dangerous situations, circumstances under which a man would have the opportunity to rape her if he wished to do so. Thus, the population of women who we can predict will consent more frequently than others is also the population of women who we can predict will be raped more frequently than others. In the context of a rape trial in which a defendant raises the defense of consent, propensity to consent "cuts both ways" and therefore—generally—does not aid the trier of fact.[114]

The ambiprobativity point about sexual propensity is insightful and useful from a rape prevention perspective, but it is ultimately not relevant to the consent-defense rape case. It is only when we know nothing else that sexual predisposition evidence is probative of both consent and rape at the same time.

Consider the case in which we know that a woman is sexually active and that she had intercourse on a particular day, but we know nothing else about the encounter (such as whether or not it was consensual). Knowing nothing else, the sexually active woman is more likely to have consented to intercourse in a given encounter than her less active sister, because she is more likely to consent in general and nothing that we know about the situation removes it from the general run of situations. She is not, however, more likely to have been raped. This is because the only reason, on our hypothesis, that her frequent sexual encounters previously increased her chances of being raped is that she would more regularly find herself in a vulnerable position vis-à-vis men who might potentially be rapists. Once we know that *both* the sexually active woman and the relatively "chaste" woman had intercourse on a particular occasion, we know the outcome that past sexual activity would have been there to predict, namely, the likelihood that each woman would be in a vulnerable position vis-à-vis a potentially predatory male. Therefore, it is no longer the case that the woman's inclination to engage in

114. *See* Bryden & Lengnick, *supra* note 40, at 1341 (arguing that a jury has "no basis in common experience for choosing between the conflicting inferences" that can be drawn from evidence of an inclination to consent to sex).

consensual sex makes both consent and rape more likely. It now only increases the odds of consent.

A woman who rarely consents to sex accordingly is less likely to be raped in general *only* because she is less likely on any given day (and therefore over time) to find herself in the vulnerable position of being alone with a man who wishes to commit rape. There is therefore no reason to think that the less sexually active woman would be any less vulnerable to an intending rapist than the more sexually active woman, once each of them is alone with a man and therefore vulnerable to rape on a specific occasion. The evidence of sexual predisposition thus loses its ambiprobativity once we know that there was intercourse on a particular occasion. It then becomes probative in only one direction, increasing the odds that for the more sexually active woman, the sex that we know took place was consensual.

As we observed by analogy in the blood donation case, learning in addition to the fact of intercourse that the complainant has accused the defendant of having raped her on the particular occasion eliminates the relevance of her sexual predisposition in determining the odds that she consented to the defendant's advances. This is because once there is an accusation in place, there is no reason to expect the sexually active accuser to be any more likely than the "chaste" accuser to have falsified this accusation. Her sexual history thus goes from being ambiprobative (when we know nothing else at all) to being uniprobative (when we know that intercourse took place) to being completely irrelevant (when we know both of intercourse *and* of her rape accusation). Her propensity to engage in consensual sex is, in other words, conditionally irrelevant to demonstrating that she was likely to have consented to a specific sexual encounter that she claims was rape.

Consider an example illustrating why ambiprobativity is illusory in consent-defense rape trials. Assume that the following two propositions are true: (1) a person who goes to the hospital regularly is more likely to be subject to an experimental procedure without his consent than a person who goes to the hospital infrequently; and (2) a person who goes to the hospital regularly is also more likely to consent to an experimental procedure than a person who goes to the hospital infrequently. Now consider the case of Bart.

Bart goes to the hospital regularly for medical care. In the absence of other information, this fact about Bart increases the odds that he will be subjected to an experimental procedure without his consent on any given day, but it also increases the odds that he will

voluntarily consent to an experimental procedure on any given day. His frequent hospital visits are thus ambiprobative if we know nothing about the day in question.

If we look behind the ambiprobativity, however, we see that each of the two relevances operates at a different level of abstraction. Bart's frequent visits to the hospital reveal an attitude on his part (perhaps a trust in doctors) that makes him more likely to consent to experimental procedures. The reason that his frequent hospital visits are also probative of the odds of his suffering *nonconsensual* procedures, however, has nothing to do with his attitude but instead results from the fact that frequent visits to the hospital mean frequent opportunities for unscrupulous medical personnel to subject a patient to such procedures. Bart's regular visits to the hospital thus help us to predict nonconsensual procedures *not* because they reveal something about the odds that he will do something. Instead, they reveal the regularity with which he places himself in circumstances in which he is vulnerable to the wrongdoing of others. To see the significance of this distinction between types of relevance, let us add a few facts to the mix.

Once we know that on a given day, Bart underwent an experimental procedure in the hospital, his frequent prior hospital visits no longer increase the odds that he suffered a *nonconsensual* procedure. He is no more vulnerable to nonconsensual procedures on that day, in other words, than another patient (Marge) who is also in the hospital but who is not a regular visitor there. The fact that Bart is a frequent hospital visitor is here relevant in only one direction: it increases the odds that he consented to his experimental procedure relative to the odds that Marge, the infrequent hospital visitor, consented to her experimental procedure.[115]

Now add a third fact, that Bart claims that the experimental procedure that he underwent on the day in question was carried out without his consent. His doctor, Illbe, says that on the morning before the surgery she sat with Bart, explained everything involved, and Bart responded that he was happy for the chance to undergo this potentially path-breaking treatment. Bart says that the only thing Dr. Illbe told him that morning was that he did not look well and that she

115. Another analogy is that one who frequently flips coins (call him Flipper) is far more likely to get a Tails at some point than someone who very infrequently flips coins (call him Unflipper). Once we know, however, that Flipper and Unflipper each flipped a coin last night, the fact that Flipper also flipped lots of coins in the past, while Unflipper did not, makes it no more likely that Flipper will get Tails than that Unflipper will.

would see what she could do for him. Bart did not, on this account, say anything at all that would authorize an experimental procedure.

It is no longer useful for us to know that Bart goes to the hospital regularly. The fact that he asserts that he did not consent to the experimental procedure on the particular day in question eliminates the probative value of his regular hospital visits. Even though the regular hospital visitor is, in general, more likely to consent to experimental procedures, there is no reason to expect that he is more likely to claim falsely that consent was not given than the less regular hospital visitor. What we would want to know about Bart and Marge is whether they regularly make false claims or accusations. If they do, then that increases the probability that they are making false accusations now. If there is no such predisposition in Bart, then we would not expect him to make a false claim, regardless of whether or not he generally consents to procedures. The same is true for Marge. In addition to learning whether Bart or Marge has a propensity for lying or making false accusations, we would want to find out whether Dr. Illbe has a propensity for performing experimental procedures without her patients' consent. It is these two propensities that are relevant to the inquiry at hand.

Now return to the sexually active woman and the consent-defense rape case. Assume that we possess three facts about her circumstances: first, she is sexually active; second, she had intercourse last night; third, she claims that it was rape. I have argued that, at this point, the fact of her propensity to consent to sex is no longer probative in either direction on the question of whether she was raped. We already know that she was exposed to a heightened risk last night. Therefore, her prior exposure to that risk does not make rape more likely than it is for the more "chaste." We also know that she claims that the intercourse that occurred last night was rape. This accusation places her experience last night into a relatively small class of sexual encounters that are not representative of the class of all sexual encounters—those the subject of a rape allegation. Of course, the jury has to decide whether to believe her accusation beyond a reasonable doubt. Treating the fact of her accusation as a piece of evidence, however, just as we might treat the fact of the defendant's denial or the fact of her physical injuries, there is no reason to expect that by virtue of her sexual proclivities, she is more likely to bring a false rape accusation against a consensual partner

than a less sexually experienced woman would be.[116] In the presence of her accusation, then, her sexual character becomes irrelevant.

CONCLUSION

This Article has proposed that we divide criminal trials into "whodunit" and "what was done" scenarios. We saw that this dichotomy gives us a means of distinguishing cases in which both parties should be barred from introducing derogatory character evidence about the defendant and the victim ("whodunit") from cases in which both parties should be free to introduce such evidence ("what was done").

In the "whodunit" context, we noted that anti-defendant propensity evidence appears far more relevant than it actually is. This disparity results from the absence within the courtroom of other suspects with similar traits or inclinations. Under these circumstances, for example, a violent character in a defendant charged with a violent crime is very damning, even though he is only one of countless violent people in the world who could have committed this offense. Compounding the gap between apparent and actual relevance is the probability that the police selected the defendant in the first instance *because of* his prior criminal history. The apparently remarkable coincidence of his propensity and his status as a defendant thus turns out to be no coincidence at all.

In the "what was done" scenario, we observed that apparent and actual relevance line up more equitably than they do in the "whodunit" case. For the defendant and the victim in the "what was done" case, there is no question that these individuals were both involved in the charged transaction. The only dispute is over their respective roles within that transaction. Deciding such cases would thus typically come down to deciding whether or not the defendant committed a *crime* rather than deciding whether it was the *defendant* who committed an uncontroversially criminal act.

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116. *See* MUELLER & KIRKPATRICK, *supra* note 26, at 492 (discussing the "sorry sexist tradition" prior to the rape shield laws of introducing evidence of the victim's sexual history in rape prosecutions to determine her credibility and likelihood of consent and asserting "[t]hat evidence of sexual behavior has no bearing on credibility standing by itself").

Indeed, we might actually expect that, to the extent that a "chaste" woman might have a greater incentive to protect her reputation for chastity than would a more sexually active woman, the probabilities of false accusation would go in the opposite direction. I have no reason to accept this two-dimensional view, but its potential plausibility demonstrates the importance of adding the rape accusation fact to the mix of data in calculating the odds.

Because all potential culprits are located in the courtroom in such cases, defendant and victim propensity evidence provides highly relevant data for choosing between the two competing versions of what happened. We saw how information about a defendant's negative character traits can significantly increase the plausibility of the guilt hypothesis. Further, we saw that negative victim propensity evidence, which the criminal defendant is (and ought to be) free to offer, has no greater relevance than negative defendant propensity evidence.

Focusing on rape cases and Rules 412–414, we then made two discoveries. First, we saw that consent-defense rape defendants are the same as other "what was done" defendants in that propensity evidence will be very useful in determining whether or not the defendant is guilty. Second, we saw how consent-defense rape victims both resemble and differ from most other victims in "what was done" cases.

We next analyzed whether it made sense, in light of the similarities and differences, to suppress and, thus, treat rape victim sexual propensity differently from victim character in other criminal cases. In the course of this analysis, we first rejected the notion that promiscuity is a meaningless construct. There is no reason to doubt that people would exhibit some consistency in this as in other areas of life. After accepting the hypothesis that sexual propensity might be an authentic character trait rather than simply a misogynist myth, we next considered whether knowing of a victim's sexual propensity helps the finder of fact decide consent-defense rape cases correctly.

We examined the Park, Bryden, and Lengnick ambiprobativity theory of why, even though the trait of sexual propensity may exist, it is nonetheless irrelevant to consent-defense rape trials because it makes both consent and rape more likely to have occurred. We found the ambiprobativity hypothesis unpersuasive, because while it is true that sexual activity correlates with both rape and consensual intercourse, this dual relevance evaporates once we learn additional information about the accuser's interactions with the accused, going from ambiprobativity to uniprobativity (when intercourse is known) to irrelevance (when intercourse and accusation are known). We analyzed the logical weight of promiscuity evidence in a rape trial. In doing so, we saw that in rape trials in which we know that intercourse took place and that the victim claims that this intercourse was rape, a victim's sexual propensity no longer helps a jury to determine whether or not the defendant raped her. I coined the phrase "conditional irrelevance" to describe this phenomenon.

After rejecting the relevance of victim promiscuity evidence in rape cases, we considered whether this irrelevance means that in consent-defense rape trials, unlike in all other "what was done" trials, victim propensity should be inadmissible. In posing this question, we came to see that victim character can be highly relevant in rape cases, but that the character trait in question is not promiscuity. By examining a series of examples, we concluded that victim propensity evidence ought to be admissible in consent-defense rape cases just as in other "what was done" cases, but that it is the victim's inclination towards dishonesty and false accusation rather than her inclination to engage in consensual sex that sheds light on the truth or falsity of her accusation.

In considering the merits of character evidence in criminal trials, we have omitted a discussion of one feature of the problem, namely, the relative necessity for the prosecution to introduce character evidence in prosecuting "whodunit" versus "what was done" crimes. Jurors in "whodunit" cases seem capable of convicting a defendant if there is sufficient case-specific evidence of guilt, even if they do not hear any evidence about the defendant's character. In a robbery trial, for example, if the victim points out the defendant and testifies that he is the one who committed the robbery, jurors are willing to believe that the victim is speaking accurately and truthfully. Until recently, this was especially true of cases in which the primary eyewitnesses were police officers.[117]

In the "what was done" case, by contrast, jurors are inclined to vote for an acquittal in the absence of evidence demonstrating a bad character on the part of the defendant.[118] Thus, in addition to being more probative in "what was done" than in "whodunit" cases, character evidence about the defendant may often be necessary in "what was done" cases as a condition of conviction. Though it is "convenient" for me that both logic and necessity point to the same evidentiary approach, it is worth asking why, in the absence of character evidence, it is more difficult to obtain a conviction in a "what was done" case than it is to obtain a conviction in a "whodunit" case. Alternatively, we might ask why the default is that, in the

117. Jurors have in the past tended to believe police officers' testimony in criminal trials. *See* Deon J. Nossell, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 246 (1993). This trend may be changing, however. *See* David Rohde, *A Hard Choice on Taking the Stand*, N.Y. TIMES, Mar. 18, 2000, at B4.

118. *See, e.g.*, Quindlen, *supra* note 4 (arguing that the acquittal of William Kennedy Smith was due substantially to the exclusion of evidence that demonstrated his character).

presence of equally sufficient evidence, the jury might convict the "whodunit" defendant and acquit the "what was done" defendant, such that character evidence about bad defendants becomes *essential* to the prosecutor's case in the latter category.[119]

Some commentators suggest that the source of the discrepancy is the "he said/she said" or "swearing contest" problem.[120] Because consent-defense rape cases seem often to present this problem, it might appear to account well for the difficulty prosecutors have (absent propensity evidence) in winning convictions in consent-defense rape cases.

As it turns out, however, this difficulty in obtaining convictions extends beyond consent-defense rape cases to "what was done" cases more generally.[121] Perhaps, then, the "swearing contest" problem applies more generally as well. Is it then true that in "what was done" cases, the defendant and victim are engaged in a "swearing contest" that leaves juries unable to decide between the two stories without character evidence as the tie-breaker? While this explanation has some surface plausibility, it is not ultimately persuasive. Criminal cases always turn on the relative credibility of defense and prosecution witnesses. Even when there is an abundance of physical evidence, juries must decide which witnesses' explanations for the physical evidence are the most compelling. Physical evidence must also, moreover, be authenticated, interpreted, and presented through witnesses. For these reasons, witness credibility remains important to most criminal cases. In addition, in "whodunit" cases, where identity is an issue, eyewitnesses can easily make a mistake about the culprit's identity, and social scientists tell us that such errors are quite common.[122] In the "what was done" cases, by and large, this

119. Prosecutors report that it is indeed much more difficult to get a conviction in a "what was done" case, such as a consent-defense rape, than in other cases. *See* Bryden & Lengnick, *supra* note 40, at 1324.

120. *See* MUELLER & KIRKPATRICK, *supra* note 26, at 472 (observing that there are often no " 'neutral' observers" in acquaintance rape cases, and thus the defendant and victim are left to contradict each other); Scott, *supra* note 30, at 1743 ("Trials involving sex crimes usually end up as 'swearing matches' between the accuser and the accused forcing the jury to decide who is more credible." (citing Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 317 (1993))).

121. *See* Bryden & Lengnick, *supra* note 40, at 1324.

122. *See, e.g.*, Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1017–18 (1995) (noting that psychological studies indicate that memory works in stages, each of which can be affected by factors that "alter a witness's perception of an event and render it unreliable"); Harvey Wallace, *Victims of Crimes: Reporting, Identification & Values*, 84 J. CRIM. L. & CRIMINOLOGY 669, 673–74 (1993) (reviewing MARTIN S. GREENBERG & R. BARRY RUBACK, AFTER THE CRIME: VICTIM DECISION MAKING (1992)) (discussing the various

perceptual weakness does not arise to interfere with the accuracy of the testimony.

If we look more closely at the "swearing contest" idea, moreover, it appears not to be much of a contest in either the "whodunit" or the "what was done" case. The defendant's testimony that he is innocent is overdetermined and predictable.[123] The defendant consistently has a strong incentive to swear to his innocence, whether or not he is innocent and whether or not he is honest. Such an incentive does not generally taint the testimony of victims, particularly victims in rape cases, because it was their choice to bring criminal charges and serve as witnesses. For this reason, any "swearing contest" is lopsided when the criminal defendant is one of the two "contestants." So we return to our question—what makes "what was done" cases so difficult for prosecutors to win?

Though there is no way to answer this question definitively, I believe that the narrative quality of the criminal trial creates juries' distinct reactions to "whodunit" and to "what was done" cases, respectively. When a criminal trial begins, the prosecution and defense attorneys present opening statements that contain competing stories from which the jury must select.[124] This is somewhat in keeping with one tradition of novels and films in which the reader or viewer can select from a series of potential endings the one she likes the best.[125] Though the particulars vary from case to case, two very

studies indicating that "the stress of the crime can significantly affect the perception and memory of the victim" and indicating that "suggestions by authority figures such as police influence the identification process"); *see also* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 892 (2000) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

123. Whether the defendant actually testifies is, of course, determined in part by whether there is a prior criminal history that might come into evidence to impeach the defendant's credibility. As commentators have pointed out, this obstacle to testifying distorts the process. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 14–15 (1999) ("While a defendant always has a right to testify, he would feel unduly restrained from doing so if he had prior convictions."); Park, *supra* note 103, at 756 ("[U]nder the current rules the defendant will sometimes choose not to testify because of fear that testimony will lead to impeachment with prior convictions.").

124. In some criminal trials, of course, the defense does not put on a case but simply challenges the story of the prosecutor. There is in such cases one story, told by the prosecutor, and a challenge to that story by the defense. As we shall see, however, the challenge generally does offer an implicit story that the jury can accept or reject.

125. *See, e.g.*, FREQUENCY (Takashi Seida/New Line Cinema 2000) (setting out a time-travel plot in which the main character is able to communicate with people from his past and thereby change his own current reality); SLIDING DOORS (Miramax/Paramount 1998) (setting out two parallel realities that differ based on the main character's having caught a

different kinds of competing narratives repeatedly emerge as a feature of each distinct scenario on trial.

Consider the "whodunit" scenario. The prosecution tells a story in which a terrible crime has been committed, and the culprit is sitting in the courtroom waiting for the jury to judge him guilty or not guilty. If the jury convicts, then—in the prosecution's narrative—the culprit suffers just punishment for his actions, and closure is achieved. If the jury acquits, on the other hand, then the guilty person gets away with his crime.

The defense in a "whodunit" trial tells a story in which the defendant has been wrongly charged and someone else committed the crime. If the jury convicts, it punishes an innocent person. If it acquits, then an innocent person is free, but a crime still goes unavenged. Both defense stories are fairly depressing: in both, a terrible crime has been committed, and the criminal will go unpunished.

The jury can do nothing to change either of these facts. Therefore, if it can, the jury will choose to reject this set of alternatives in favor of the prosecution's happier narrative: although a terrible crime has taken place, it is in the jury's power to avenge that crime and thus to achieve retributive justice. The guilty verdict represents the jury's embrace of the happiest available narrative—that of the prosecutor. In the "whodunit" scenario, the jury does not have the option of deciding that there was no crime, because everyone acknowledges that there was one.

Now consider the "what was done" scenario. The prosecution tells a story in which a terrible crime has occurred, and the culprit is in the courtroom waiting for judgment. If the jury convicts, then the criminal is brought to justice; if it acquits, then he is not. Unlike the prosecutor, the defense tells a story in the "what was done" case quite different from what it told in the "whodunit" case: The defense asserts that no crime has taken place. If the jury acquits, it finds that there was no crime, there was no victim, and there accordingly need be no retribution. If the jury convicts, on the defense version, then an innocent man is unjustly punished. The most attractive in this group of possible stories is the story of innocence and acquittal. It is truly a

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train versus her having missed that same train, and exploring the interaction between the two simultaneous realities); RUN LOLA RUN (Arte 1998) (taking the film's viewer through more than one possible outcome, each of which is dependent on an initial choice made by the main character); *see also* SHEAR MADNESS (Cranberry Productions, currently being performed in Boston, Chicago, San Francisco, and Washington, D.C.) (allowing the audience to vote on an ending to be acted out).

happy ending if there was no crime at all, happier even than the crime that is avenged by a conviction. Thus, my hypothesis is that as between the prosecution and defense narratives in "what was done" cases, the jury prefers to believe the defense and to bring back an acquittal. This offers the happiest possible ending.

If I am correct about the jury's motivations, a level of denial is intrinsic to this enterprise. After all, if a crime did take place, the jury cannot alter that truth simply by refusing to believe it and acting accordingly. It is worse, moreover, to deny a crime that did happen than it is to acknowledge it and punish the perpetrator.[126] Similarly, if an innocent person is on trial for an unquestionably criminal act, the jury cannot change the fact that the true culprit is at large simply by convicting the defendant that is before it. It is accordingly worse to convict the innocent person (and thus, incidentally, also to ensure the continuing freedom of the guilty party) than it is to acquit him.

The jury, however, might feel (as in audience-participation theater) that it plays a role in constructing and shaping the truth.[127] If it is possible to find no crime, the jury does so and believes that no crime has been committed. If it is not, then the jury brings the culprit to justice. To that extent, the jury absorbs the idea that legal "truth" and actual "truth" are one and the same. Like the common law judge who "finds" the law by consulting his own view of right and wrong, the juror chooses to "find" the facts that add up to a story of justice with a happy ending.[128]

126. Holocaust denial represents an extreme example of selecting denial over acknowledgment. *See generally* DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993) (analyzing the beliefs of Holocaust revisionists who deny the occurrence of the Holocaust and arguing that such persons are dangerous); *cf.* Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Reponses to Fetus Envy*, 72 B.U. L. REV. 101, 106–07 (1992) (discussing denial and devaluation as alternative emotional strategies for reacting to a threatening phenomenon, both of which have a similar impact in diminishing the suffering of an oppressed group).

127. *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1363 (1985) (noting that jurors may see their role in the courtroom as that of making a statement that decides the events that occurred).

128. *See* RONALD DWORKIN, LAW'S EMPIRE 228–40 (1986) (describing the "chain novel," in which a number of authors write a series of episodes or chapters based on what the author directly before has written). Dworkin draws an analogy between authoring a chain novel and engaging in the process of judicial decision-making. A judge knows what other judges have decided and must finish the current "story" before her by making a fair decision which considers the facts presented as well as previous decisions by other authors. *See id.*

If this theory is correct, the introduction of character evidence alters the jury's attachment to the happy ending narrative by complicating the picture. If jurors must choose between no crime and punished crime, they might pick no crime. However, if they come to view the victim as a credible, honest, and believable person and the defendant as a cruel and violent person, then the "no crime" outcome comes to represent a potential judgment of the victim. In other words, character evidence about defendant and victim focuses the jury on the fact that someone did something reprehensible in this case and that the jury—in its verdict—will officially declare who that someone is. The incentive to get it right comes to represent the happier ending than the embrace of a happy illusion to the detriment of an innocent victim.

As we have seen in our discussion, "what was done" cases are very much about the people involved in a transaction, about what the people were likely to have done and to have said. This is why getting to know the character of these people is both relevant and often essential to an informed jury's deliberative process. There is therefore every reason to distinguish between negative character evidence in "whodunit" cases, where it should be excluded, and in "what was done" cases, where character evidence is often illuminating without raising the specter of unfairly singling out a defendant from a large class of "bad" people.